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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, W. ALONZO REYNOLDS, JR., BY HIS GUARDIAN AD LITEM W. ALONZO REYNOLDS, ET AL., APPELLANTS,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ROBERT GORDON SPROUL, AND ERNEST CARROLL MOORE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 31, 1934.

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

(A)

No. L. A. 14573

ALBERT W. HAMILTON, a Minor, by Albert Hamilton, His Guardian ad Litem; W. Alonzo Reynolds, Jr., a Minor, by W. Alonzo Reynolds, His Guardian ad Litem, Albert Hamilton, and W. Alonzo Reynolds, Petitioners,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a Corporation; Robert Gordon Sproul, as President of the University of California, and Ernest Carroll Moore, as Vice President of said University and Provost of the University of California at Los Angeles, Respondents

PETITION FOR WRIT OF MANDATE—Filed Dec. 8, 1933

To the Honorable the Supreme Court of the State of California:

Your petitioners above named respectfully apply for a writ of mandate, by this their verified petition, and in this behalf set forth the following facts and causes for the issuance of the writ, namely:

I

All of your petitioners are citizens and taxpayers of the United States and of the State of California, and residents of the County of Los Angeles, and over the age of 18 years.

Petitioner Albert Hamilton is the father and guardian ad litem of petitioner Albert W. Hamilton;

[fol. 2] Petitioner W. Alonzo Reynolds is the father and guardian ad litem of petitioner W. Alonzo Reynolds, Jr.;

Both such guardians ad litem were duly appointed as such by this court on December 7, 1933, concurrently with the filing of this petition.

II

Respondent, The Regents of the University of California, a corporation, is a corporation organized and existing under and by virtue of the Constitution and Laws of the State of California, to administer the University of California, which is a public trust;

Respondent, Robert Gordon Sproul, is President of the University of California;

Respondent, Ernest Carroll Moore is Vice President and Provost of the University of California at Los Angeles.

III

On or about October 1, 1933, petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., were duly received, registered and entered as students of approved moral character at the University of California at Los Angeles; that each of said petitioners was thereafter continuously, until suspended, as hereinafter related, a student in good standing, with satisfactory records scholastically and in attendance and conduct, and in all other respects, with the single exception that said petitioners failed and declined to attend [fol. 3] or to take the prescribed courses in military science and tactics in the Reserve Officers Training Corps, which is an integral part of the military establishment of the government of the United States and not connected in any way with the militia or military establishment of the State of California.

The primary object of establishing units of the Reserve Officers Training Corps at the University of California is in fact and as officially announced in the University's publications, to qualify students for appointment in the Officers Reserve Corps of the United States Army. The courses in military training are those prescribed by the War Department for infantry units of the senior division of the Reserve Officers Training Corps. The Regents of the University of California require enrollment and participation in said courses of military training for at least two academic years of all able-bodied male students who are citizens of the United States. Said courses include instruction in rifle marksmanship, scouting and patrolling, drill and command, musketry, combat principles, and use of automatic rifles. Arms, equipment and uniforms for use of students

in such courses are furnished by the War Department of the United States government.

[fol. 4]

IV

All of your petitioners are and have been for a number of years active members of the Methodist Episcopal Church and of the Epworth League and other religious societies and organizations in connection therewith.

Petitioners Albert Hamilton and W. Alonzo Reynolds, the fathers, respectively of your two student petitioners, Albert W. Hamilton and W. Alonzo Reynolds, Jr., are duly ordained ministers of the Methodist Episcopal Church and have been such for many years.

The Southern California Conference of the Methodist Episcopal Church, at its 1931 session, adopted the following resolution on the subject of exemption from military service:

"With full appreciation of the heroic sacrifices of all those who have conscientiously and unselfishly served their country in times of war, but with the belief that the time has come in the unfolding light of the new day for the settlement of human conflicts by pacific means, and

"Because we as Christians owe our first and supreme allegiance to Jesus Christ.

"Because the Methodist Episcopal Church in her General Conference of 1928 has declared: 'We renounce war as an instrument of national policy.'

"Because our nation led the nations of the world in signing the Paris Peace Pact, and the Constitution of the United States, Article 6, Section 2, provides that: 'This Constitution and the laws of the United States which shall be made [fol. 5] in pursuance thereof and all treaties made under authority of the United States shall be the Supreme Law of the Land'.

"Thus making the Paris Pact the supreme law of the land which declares: 'The high contracting parties agree that the settlement of all disputes or conflict—shall never be sought except by pacific means'.

"Therefore we, the Southern California Conference, memorialize the General Conference which convenes in Atlantic City in May, 1932; to petition the United States Government to grant exemption from military service to

such citizens who are members of the Methodist Episcopal Church, as conscientiously believe that participation in war is a denial of their supreme allegiance to Jesus Christ."

Said Southern California Conference at its 1933 session adopted the following resolution on the subject:

"Reserve Officers' Training Corps

"Recalling the action of the General Conference asking for exemption from military service for those members of our church to whom war and preparation for war is a violation of conscience, we request the authorities of our State Universities at Berkeley, Los Angeles and Tucson, to exempt Methodist students from the R. O. T. C. on the grounds of conscientious objection, and we hereby pledge the moral and official backing of this Conference, seeking such exemption, provided that it be understood that no conscientious objector shall participate in the financial profits of war. The Secretary of the Conference is asked to send copies of this paragraph to the governing boards of these institutions."

And said Methodist Episcopal Church, as a part of its tenets and discipline now in full force and effect, adopted, by its General Conference of the United States in 1932, the following:

[fol. 6] "We hold that our country is benefited by having as citizens those who unswervingly follow the dictates of their consciences * * * Furthermore, we believe it to be the duty of the churches to give moral support to those individuals who hold conscientious scruples against participation in military training or military service. We petition the government of the United States to grant to members of the Methodist Episcopal Church who may be conscientious objectors to war the same exemption from military service as has long been granted to members of the Society of Friends and other similar religious organizations. Similarly we petition all educational institutions which require military training to excuse from such training any student belonging to the Methodist Episcopal Church who has conscientious scruples against it. We earnestly petition the government of the United States to

cease to support financially all military training in civil educational institutions."

As members of the Methodist Episcopal Church all of your petitioners have accepted and do accept and feel themselves morally, religiously and conscientiously bound by the tenets and discipline of said Church, as expressed in the resolutions quoted herein from the General Conference and the Southern California Conference of said Church; each of your petitioners is a follower of the teachings of Jesus Christ; each of them accepts as a guide to his life the teachings of Jesus and of the Bible and particularly in this connection petitioners allege that each of them holds, as a part of his religious and conscientious belief, that war and training for war and military training are immoral [fol. 7] and wrong *and wrong* and contrary to the letter and spirit of the teachings of Jesus and the precepts of the Christian religion.

V

Therefore, petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., at the beginning of the Fall Term of the University in October 1933 respectfully petitioned the appropriate authorities of the University for exemption from military training and participation in the activities of the Reserve Officers Training Corps, upon the sole and exclusive ground of their religious and conscientious objection to war and to military training; said petition was denied; thereupon, through the Bishop of the Methodist Episcopal Church of California your petitioners presented to The Regents of the University of California a petition that military training at the University of California be by The Regents made optional in order that conscientious and religious objectors to war and training for war and military training might not be confronted with the necessity of violating and foreswearing their conscientious and religious beliefs or being denied the right of education in the State University to which petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., are entitled under the constitutions and laws of the State of California and of the United States.

[fol. 8] Thereafter, and on or about October 10, 1933, respondent, The Regents of the University of California,

by resolution refused to make military training optional, and refused to exempt petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., from compulsory military training at the University.

VI

Thereafter petitioners, Albert W. Hamilton and W. Alonzo Reynolds, Jr., declined, solely because of their religious and conscientious objections, to take the courses in military training and/or to participate in the activities of the Reserve Officers Training Corps. Upon the sole and exclusive ground of their thus declining, said petitioners were suspended and excluded from the University on or about November 17, 1933. The order of suspension as to each of your said petitioners, delivered to each of them upon the order of respondent, Dr. Ernest Carroll Moore as Vice President and Provost of the University, was and is as follows, to wit:

"You are hereby notified that you stand suspended from the University of California at Los Angeles by reason of your refusal and failure to pursue therein the course in Military Science and Tactics which is required by the Regents of the University of California to be undertaken by able bodied male and undergraduate students, citizens of the United States.

[fol. 9] "You may apply for readmission at any time, subject to the understanding that your readmission must be conditioned upon your ability and willingness to comply with all applicable regulations of the University governing the matriculation and attendance of students."

Said order of suspension has not been revoked or modified, and petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., are now excluded from the University thereby.

VII

The University of California as a state institution affords education such as, and upon such terms as, are not to be had at any other educational institution in California, except at greater cost, which petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., are not able to pay.

VIII

Petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., at all times mentioned herein have been and now are ready, able and willing to take, as a substitute for military training, such other courses as may be prescribed by the University, which fact was known to respondents before the date of the order of suspension above set out.

IX

Your petitioners have no plain, speedy or adequate remedy at law. Unless prevented by the mandate of this Honorable Court the respondents will continue to exclude [fol. 10] petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr. from the University, and from the rights and educational advantages and opportunities provided by the University, in violation of their rights under the Constitutions and laws of the United States and of the State of California, as will appear more fully from the Memorandum of Points and Authorities filed herewith in support of this Petition.

X

Your petitioners are the real parties in interest herein, and the other parties interested, who will be affected by this petition, are the respondents above named, and all members of the Methodist Episcopal Church who are religious and conscientious objectors to war and military training, and all conscientious objectors to war and military training who are or may be or seek to be students of the University of California.

XI

This petition is presented originally to the Honorable the Supreme Court of California, rather than to any lower court, for the following reasons, which, in the opinion of petitioners, render it proper that the writ should issue originally from this Court:

[fol. 11] 1. That it is necessary and essential that petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., be reinstated as students at the University without unnecessary delay in order that their education may proceed.

2. That there has been no decision by this Court or any other courts of California, so far as your petitioners have been able to learn determining whether or not members of the Methodist Episcopal Church or other students who are conscientious objectors to war and military training may be compelled to submit to military training at the expense of the sacrifice of their religious and conscientious scruples, or be denied their education at the University of California which is maintained by the people of the State for the education of its youth.

3. That repeatedly the issue has been raised at the University as to the right of conscientious and religious objectors to be exempted from compulsory military training, and such issue is likely to arise at every term or semester of the University with resulting disturbance and unrest of the University and the student body, until said issue shall have been settled by a decision of this Honorable Court; and it is therefore in the interest of the University as well as of your petitioners, that the issues [fol. 12] herein involved shall be settled promptly by this Court;

4. That the Methodist Episcopal Church, upon whose tenets and discipline your petitioners base their claims herein sued upon, numbers tens of thousands of citizens of California and many hundreds of thousands of citizens of the United States who are interested in the assertion and protection of the rights of religious and conscientious objectors to education at the hands of the State University without their having to foreswear their conscience and their deepest religious convictions;

5. That the constitutional rights which your petitioners seek to assert and vindicate by this proceeding are among the most deep-seated and vital rights guaranteed to all of the people by the Constitutions of the United States and of the State of California;

6. That the decision of any lower court than the Supreme Court of California would not be conclusive or satisfactory to any of the parties to this proceeding, and your petitioners are informed and believe and therefore allege that the losing side in any proceeding in any lower court would bring this matter to this court upon appeal, so that a decision by this court sooner or later must be had.

[fol. 13] 7. That questions of law alone are involved in this proceeding, none of the facts being in dispute, and your petitioners are advised and believe, and so allege, that there will be no requirement upon the part of either side to produce evidence before the Court, and that the issues can be submitted and determined upon the law alone.

8. That your petitioners estimate that there are several hundreds of students now in attendance at the University of California at Los Angeles who are members of families which are identified with the Methodist Episcopal Church and therefore vitally interested in the determination by this court of the matters herein involved.

Wherefore your petitioners pray that an alternative writ of mandate issue out of and under the seal of your Honorable Court directed to the respondents above named, commanding them to receive and admit into the University of California at Los Angeles as students your petitioners Albert W. Hamilton and W. Alonzo Reynolds, Jr., or to show cause before this Court at a specified time and place why said respondents have not done so, and for all other and further relief to which your petitioners may be entitled.

John Beardsley, Attorney for Petitioners.

[fol. 14] *Duly sworn to by W. Alonzo Reynolds. Jurat omitted in printing.*

[fol. 15] In Supreme Court of California

[Title omitted]

Points and Authorities in Support of Petition for Writ of Mandate

I

This petition for the reasons stated therein is appropriately brought originally to the Supreme Court of California.

Bryan v. The Regents of the University of California, 188 Cal. 559.

II

The Regents of the University of California, a corporation, is properly made a party defendant, since Section 9 of Article IX of the Constitution of California vests in that corporation "full powers of organization and government" of the University, and declares that the University "shall constitute a public trust".

III

Any resident of California, of the age of fourteen years or upwards, of approved moral character shall have the right to enter himself in the University as a student at [fol. 16] large, and receive tuition in any branch or branches of instruction at the time when the same are given in their regular courses, on such terms as the board of regents may prescribe. (Act approved March 23, 1868, Statutes of California, Seventeenth Session (1867-1868), Chapter CCXLIV). That statute in conjunction with Section 9, Article IX of the Constitution of California, would seem to establish the right of petitioners to attend the University. They were entered regularly, and their right to enter was thus recognized. Then they were suspended, solely because they declined to take the courses in military training. The question then is whether students in good standing may be dismissed from the University and denied their right to education at the hand of their state solely because they decline to forswear their consciences and violate their deepest moral and religious convictions.

IV

Those powers of the regents may not be exercised arbitrarily or unreasonably. For example, no one would contend that the regents might exclude from the University all Methodists, or Catholics, or Jews, or Quakers, or Conscientious Objectors to war and military training.

[fol. 17]

V

The Reserve Officers Training Corps at the University is an integral part of the military forces of the United States, U. S. C. A. Title 10, Army, Chapter 20, Reserve Forces; Section 381, Establishment of Reserve Officers Training Corps.

The R. O. T. C. is not in any sense a part of the military establishment of the State of California. The new Military Code of California, approved June 16, 1933, contains no mention of or reference to the R. O. T. C.

That being true, the organization's membership, control, courses of study, etc., are governed by Federal law. The Morrill Land Grant College Act (Act of Congress approved July 2, 1862) does not require that courses in military science and tactics shall be compulsorry. (Opinions of Attorney General of the United States, July 19, 1923 and June 20, 1930.) No state law (unless we consider as a law the ruling of the Regents, under their general powers under the Constitution) requires that military training shall be compulsory.

VI

Suspension of these students because of their conscientious objection to war and military training amounts to a denial of their right to the equal protection of the laws in violation of Section 1 of the Fourteenth amendment to the Constitution of the United States. Those who religious [fol. 18] and conscientious scruples permit them to drill are afforded the protection, the benefit, of the laws establishing and maintaining the University for the education of all the youth of the State.

VII

Denial of these students' right to education at the State University for their refusal to join the Reserve Officers Training Corps of the United States Army abridges their privileges and immunities as citizens of the United States, in violation of Section 1 of the Fourteenth Amendment. By Federal law they are exempted, in time of peace, from compulsory service in any branch of the Federal military establishment. That exemption, that immunity, is abridged by the rule of the Regents requiring compulsory service in the R. O. T. C.

VIII

Enforcement of compulsory military training prohibits the free exercise of religion, in violation of the First Amendment, and of the Fourteenth Amendment's provision that no state shall deprive any person of liberty without

due process of law, in that it denies petitioners the education to which they are entitled under the Constitution and laws of California, solely because of their refusal to violate their consciences and deepest moral and religious convictions.

[fol. 19]

IX

Compulsory military training, when imposed upon religious and conscientious objectors to war and military training, deprives them of their liberty without due process of law, in violation the Fifth Amendment to the Constitution of the United States.

X

Compulsory military training invades the right of freedom of religion and of conscience, in violation of Section 4, Article I of the Constitution of California.

XI

Suspension of students from the State University because their conscientious and religious scruples restrain them from joining the Reserve Officers Training Corps amounts to imposing a sectarian test as a condition to their getting an education, in violation of Section 1405, Political Code. That section provides that "No sectarian • • • test must ever be allowed or exercised in the • • • admission of students thereto, (the University) or for any purpose whatsoever. • • •"

XII

Compulsory military training violates Section 9 of Article IX of the California Constitution wherein it is provided that military tactics shall be taught at the University "in accordance with the requirements and conditions" of the Federal land grant college law.

[fol. 20] That law, as stated hereinabove, has at least twice been interpreted by the Attorney General of the United States as not imposing, as a requirement or condition, compulsory military training.

XIII

Congress, whose acts created and govern the R. O. T. C. has always respected the freedom of conscience of religious

objectors to war, and exempted them from combatant service, leaving it to the President to define non-combatant service. Considering that fact together with the fact that compulsory military training in government-aided colleges in the states is not required by Congress, we may logically conclude that it was the definite intention of Congress, in passing the Morrill Act in the midst of the Civil War, that courses in military tactics should not be compulsory.

XIV

Compulsory military training, announced by the University as being primarily for the purpose of training officers for the United States Army, violates the spirit if not the letter of the Kellogg Pact of 1926, in which treaty the United States joined more than fifty other nations in a solemn contract never to resort to other than pacific means in the settlement of international differences. We are not unmindful that the sovereign Federal government may, as [fol. 20a] all sovereigns may and many do, violate treaty obligations. But individual states of the Union may not. They, and their law-making, law-enforcing and law-interpreting agencies are bound by treaties as a part of the supreme law of the land, as they are denominated in Article VI of the Constitution.

For the foregoing reasons, it is respectfully submitted that this Court may properly take original jurisdiction of this cause, and that the alternative writ of mandate should be issued.

John Beardsley, Attorney for Petitioners.

[fol. 21] IN SUPREME COURT OF CALIFORNIA

(C)

L. A. 14573

HAMILTON

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA

ORDER DENYING PETITION FOR WRIT OF MANDATE—Dec. 11, 1933

By the Court.

The petition for a writ of mandate herein is denied.

Dated December 11, 1933. Waste, C. J.

[fol. 22] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

(D)

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 30, 1933

To the Honorable the Supreme Court of the State of California:

By leave of the Court, petitioners present this petition for rehearing. More accurately this paper might better be entitled "Petition for Hearing", for there has been no hearing as yet. No answer, demurrer, or other pleading to the petition for mandate has been served, nor, so far as counsel is informed, filed on behalf of the respondents. At the outset, therefore, we respectfully suggest that perhaps the Court will afford us an opportunity to be heard in oral argument in open court, as is quite commonly done. Our petition was for an alternative writ of mandate. We recognize the discretion of the court to deny us that. But the law provides that the writ of mandate may be issued upon motion, and we had assumed that upon denial of the alternative writ there would be no adjudication of the case upon its merits until both sides had had opportunity to be heard. [fol. 23] Therefore, we appreciate the Court's suggestion that a petition for rehearing be filed.

This case is brought seriously, in the belief that the issues raised are vital and spring from the traditional guaranties of religious liberty and freedom of conscience contained in the Federal and State Constitutions. That those guaranties exist is denied by none. The question then is as to their applicability to the facts in this case. The authorities directly in point are few. We propose to show, however, that they are pertinent, and may not be disregarded.

Briefly, the essential facts may be summarized as follows:

Two young men, American born citizens of the United States and of California, have been suspended from the State University upon the exclusive ground of their refusal, upon religious and conscientious grounds, to participate in military training in the Reserve Officers Training Corps,

which is by order of the Regents of the University made a compulsory requirement of all male students who are citizens of the United States, for the first two years of their college course. Both these young men are sons of Methodist ministers, and their fathers join them in this proceeding for mandamus to compel reinstatement of the boys as students at the University.

[fol. 24] The General Conference of the Methodist Episcopal Church, and its Southern California Conference, have adopted, as a part of the discipline and tenets of the Church, resolutions condemning war and military training. Those paragraphs of the Church discipline are set out in our original petition, to which we refer the Court for their text.

Your petitioners, as set out in the petition for mandate, accept and feel themselves bound by the discipline of the Church; each of them is a follower of the teachings of Jesus, and feels that he owes his first and supreme allegiance to Him. Each of your student petitioners feels that he may not participate in military training without doing violence to his deepest religious and conscientious convictions.

These facts give rise to the vital question of law whether the State, acting through the Regents of the University, may compel students who are conscientious objectors to join the Reserve Officers Training Corps, a distinctly and exclusively Federal military organization, or, for their refusal so to do, deny them the education at the hands of their State University, to which they are entitled as a matter of right under the Constitutions and laws of California.

[fol. 25] In order that the issues of law may be clarified, we point out that there is not involved herein:

1. The power of the Regents to prescribe compulsory courses in physical education. The University's own publications announce that the primary object of establishing units of the R. O. T. C. at the University is to quality students for appointment in the Officers Reserve Corps of the United States Army. Physical exercise is entirely incidental.

2. The power of the state to organize and maintain its militia, with or without the requirement of compulsory service therein.

3. The power of the Regents to impose all reasonable regulations and requirements for the administration and government of the University, under the authority of Section 9 of Article IX of the Constitution of California. We shall argue, however, that that power may not be exercised arbitrarily or unreasonably.

4. The claim of aliens, seeking citizenship, to exemption from military service upon religious or conscientious grounds. That claim was denied by the U. S. Supreme Court in the Schwimmer, MacIntosh and Bland cases.

5. The power of the Federal government in time of war, or of peace, to compel all citizens to render military service.

[fol. 26] 6. The question whether or not the Morrill Land Grant College act of Congress requires the University to provide courses in military science and tactics. Undoubtedly it does. Whether that act requires that such courses shall be compulsory will be discussed; and we shall contend, upon highly respectable authority, that it does not.

The foregoing questions having been put aside as not involved herein, and as tending to confuse the real issues, let us turn to the propositions of law upon which this proceeding is founded. We shall undertake to show that the suspension of these two young men from the University solely because of their refusal, upon conscientious and religious grounds, to join the Reserve Officers Training Corps of the United States military establishment to participate in military training is violative of

(a) The Constitution and laws of the State of California;

(b) The Constitution and laws of the United States;

(c) The Paris Pact outlawing war, which is one of the treaties to which the United States is a party, and a part of the supreme law of the land.

State Questions (a)

(a) The University of California is "a public trust, to be administered by the existing corporation known as "The Regents of the University of California", with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance

[fol. 27] with the terms of the endowments of the University and the security of its funds * * *".

(Constitution of California, Article IX, Section 9.)

The "existing corporation known as The Regents * * *", was created by the Statutes of 1867-68, setting up the state university and establishing the right of students to attend. The act provides that "Any resident of California, of the age of fourteen years or upwards, of approved moral character, shall have the right to enter himself as a student at large, and receive tuition in any branch or branches of instruction at the time when the same are given in their regular courses, on such terms as the board of regents may prescribe". (Act aproved March 23, 1868, Statutes of 1867-1868, Chapter CCXLIV.)

The powers of the regents, under the Constitution and laws above quoted, of organization and control of the University certainly may not be exercised arbitrarily and unreasonably. That this is true becomes apparent immediately when we suggest the adoption of a rule by the regents that only Methodists, or negroes, or citizens born of Chinese parents might be received as students. No court would sustain such an arbitrarily and unreasonble exercise vested in the regents. The very statement of the proposition carries its own refutation.

[fol. 28] Let us then consider that grant of power to the Regents in the light of the guaranty of freedom of religion, and of conscience, in Section 4, Article I of the California Constitution. That section is as follows:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

We submit that freedom of religion and of conscience means, perhaps first of all, the right to worship God according to the dictates of one's own conscience, which right, as we all know, has been upheld repeatedly by State and Federal Courts, high and low. Certainly that right means noth-

ing more than the right, within one's own consciousness, silently to worship in accordance with one's conscience. No law could interfere with the exercise of that right, and a constitutional guaranty of it would be idle and useless. Freedom of religion, referred to also as freedom of conscience in the California Constitution, must have a broader significance.

We are familiar with the cases that hold that the constitutional guaranty of freedom of religion does not invalidate statutes or rules of the University regents requir- [fol. 29] ing vaccination as a health measure, or laws condemning the practice of polygamy even though it is sustained by the tenets of a religious sect. Such statutes clearly are within the police power of the State. We submit, however, that it is a very different matter to nullify the principle of freedom of conscience by suspending college students, and denying them the education to which they are entitled under the law as citizens of the state, solely because of their refusal to forswear their deepest religious and conscientious convictions. Public health, morals and safety, which are the traditional concern of the police power, are not involved. If it be suggested that the public safety is to be conserved by compelling military training, we submit that the power of the state in that behalf might extend to forcing students to serve in the state militia, but not to enforcing involuntary service in the Reserve Officers Training Corps, which is a part of the Federal military establishment, and not in any way identified with the state's military service. This point will be referred to later in the discussion of the substantial Federal questions involved in this proceeding.

The right of conscientious objectors to war to exemption from military service always has been recognized in the United States. In every war acts of Congress have re- [fol. 30] spected that right. True, as a Federal matter, the right has been held to be statutory, and not constitutional, U. S. vs. MacIntosh, 283 U. S. 605, 75 L. Ed. 1302. We refer to it here as evidence that the Federal government always has acknowledged freedom of conscience as a real and fundamental right of citizens of a Democracy. The Federal Constitution does not mention "conscience" in the guaranty of religious freedom. But the California Constitution mentions freedom of conscience as synonymous, or

interchangeable, with freedom of religion. Of what avail is that guaranty, if citizens are to be denied their right to education as a penalty for their devotion to conscience and religion?

Not only the Constitution, but the statutes of California are violated by the arbitrary exclusion of the student petitioners herein from the University. Section 1405 of the Political Code forbids the allowance or exercise of any sectarian test in the admission of students. We submit that the suspension of Methodist students solely because of their refusal to renounce their Methodist faith constitutes the exercise of a sectarian test.

Similarly, compulsory military training violates Section 9 of Article IX of the California Constitution, as pointed out in paragraphs XII and XIII of our original petition herein.

[fol. 31] Federal Questions (b)

Substantial and important Federal questions are involved in this proceeding. May we respectfully express our conviction that this court is concerned with the rights of citizens of the United States guaranteed by the Constitution, the acts of Congress and the treaties of the Federal government, which constitute the supreme law of the land. And we are persuaded that it is the duty of this court to protect those rights. Therefore, we point out, as alleged in our original petition, the suspension of our student petitoners violates their constitutional rights as citizens of the United States, as set forth in Paragraphs V, VI, VII, VIII, IX and XIV of the memorandum of points and authorities filed with the original petition herein.

These Federal questions, as well as the propositions resting upon the Constitution and laws of California, we desire to argue before this Court at the hearing to which we believe the petitioners, and the great body of religious and conscientious objectors to war and military training, are entitled. We present them briefly here with the hope that the court will afford us opportunity to argue them orally in more amplified and more nearly adequate form.

[fol. 32] I

Suspension of the two student petitioners from the University exclusively because of their refusal, solely upon con-

scientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps violates the guaranty of religious freedom provided in the First Amendment to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *

For many years, and in numerous cases, the Supreme Court of the United States adhered to an early decision that the First Amendment protected civil liberties against Congressional action only, and was not applicable to State laws. Thus in Permoli v. First Municipality, (3 How. 609), the Court said:

"The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the State Constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States."

And in U. S. v. Cruikshank, (92 U. S. 542), the Supreme Court said:

[fol. 33] "This amendment was not intended to limit the powers of State governments in respect to their own citizens, but to operate upon the National Government alone. The right (to assemble and to petition) was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in this enjoyment * * * the people must look to the States. The power for that purpose was originally placed there and has never been surrendered to the United States."

These two citations are typical of many. But their interpretation of the First Amendment no longer is the law. In Gitlow v. New York, 268 U. S. 652, 69 L. Ed. 1138, the Court assumed, but did not decide, that the liberty guaranteed by the First Amendment against Congressional restriction is a part of the liberty of which the Fourteenth Amendment provides that no state shall deprive any person without due process of law.

But a definite and positive decision to that effect came in Stromberg v. California, 283 U. S. 359, 75 L. Ed. 117,

decided in May 1931, in which the constitutionality of Section 403a of the Penal Code, California's Red Flag law [fol. 34] was attacked. The Court there held that a State law that is capable of construction as embracing conduct which the State may not constitutionally prohibit is invalid as infringing upon the constitutional right of free speech, and accordingly repugnant to the guaranty of liberty contained in the Fourteenth Amendment. It was argued there concerning freedom of speech and of the press, as it is argued here concerning freedom of religion and of conscience, that those American civil liberties are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. And the Supreme Court sustained that contention. In the opinion written by Mr. Chief Justice Hughes we find, at page 1123 or Vol. 75 L. Ed. this eloquent statement of the American doctrine of freedom:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be made by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

[fol. 35] And again in Near v. Minnesota, 283 U. S. 697, 75 L. Ed. 1357 at page 1363, the United States Supreme Court, again speaking through Mr. Chief Justice Hughes, said:

"It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property." (Citing cases, including Stromberg vs. California, supra.)

On the same page of the opinion the Court rests its decision partly upon a number of such cases as Adkins v. Chil-

dren's Hospital, 261 U. S. 525, 560, 561; 67 L. Ed. 785, 797, 798, in which freedom of contract is protected from statutory invasion, saying:

"* * * this Court has held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

[fol. 36] We call attention also to this sentence in the same opinion, at pages 1363 and 1364 of 75 L. Ed.:

"* * * in passing upon constitutional questions the Court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect."

Applying that test to the case at bar, we submit that the suspension of our student petitioners from the University for their refusal to forswear their religious and conscientious convictions may not fairly be construed otherwise than as an unwarranted, arbitrary and unreasonable invasion of that freedom of religion guaranteed by the First Amendment. Just as Stromberg v. California, supra, extended the protection of the First Amendment to include the right of free speech to exemption from restriction by the states; and just as Near v. Minnesota, supra, likewise broadened the application of the amendment to include the protection of freedom of the press from state incursion; so, we respectfully submit, must the same protection to freedom of religion be afforded citizens of the United States against interference by the states.

[fol. 37] And of course it is the duty not only of the Federal Courts, but of this honorable Court, to protect and defend citizens of the United States in the exercise of their rights as guaranteed to them by the Constitution of the United States.

II

Suspension of your student petitioners from the University because of their refusal to renounce their deepest religious and conscientious convictions and submit to military training abridges their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment.

At the University of California military science and tactics are taught, and military training and drill are required of students as members of the Reserve Officers Training Corps. That organization is no part of, and has no connection with, the military establishment of the State of California. The State's new Military Code, approved in June 1933, contains no mention of or reference to the R. O. T. C. If the military companies at the University were a part of the militia, our case would be entirely different. No question arises here of the power of the State to impose compulsory membership in the militia as a condition of education in the State's great University. What the State demands, under penalty of dismissal for failure to comply, is that [fol. 38] students shall become members of a distinctly Federal military unit. The R. O. T. C. is an integral part of the military forces of the United States. U. S. C. A. Title 10 Army, Chapter 20, Reserve Forces; Section 381 Establishment of Reserve Officers Training Corps. The organization's membership, control, courses of study, etc., are under the direction and control of the War Department. The commanding officers, the uniforms, weapons are supplied by the Federal Government. And as stated in the University's Bulletin for the information of students, the primary object of establishing units of the R. O. T. C. at the University is to qualify students for appointment in the Reserve Officers Corps of the United States Army. If that primary object were to train men for officers in the State Militia, our point now being made would not be well taken. For the State's militia is the State's affair. But the R. O. T. C. is a branch of the Federal military forces, established, instituted, governed by Federal statutes. We find no mention of it in any California statute.

And enforced service in any branch of the Federal military establishment in time of peace is not tolerated by Federal law. It is true that every citizen is bound to render military service to his country when called upon to do so. (Act April 22, 1898, 30 U. S. Stat. at L. 361 c. 187 etc. 1.) But, as said in 5 C. J. at page 297, citing In Re Riley, 20 F. [fol. 39] Cas. No. 11834; 1 Ben. 408, 39 How. Pr. (N. Y.) 108:

"The army is recruited in times of peace, and, except when conscription becomes necessary, in times of war also, by voluntary enlistment. The enlistment of soldiers in the

army of the United States, as an incident to the power to raise armies, is wholly within the regulation and control of Congress."

It is thus apparent that citizens of the United States are exempt from enforced military service in times of peace. In other words, one of the privileges and immunities of citizens is freedom from compulsory service in any branch of the Federal military establishment in time of peace and even in time of war except when Congress regards conscription as a necessity and enacts statutes to meet that need. Without congressional action, the government, acting through the War Department, may not abridge that immunity of its citizens. How then may the State do so without doing violence to the Constitutional guaranty against such abridgement?

It will be argued against our contentions, that the privilege of attending the University is a privilege of state residence or citizenship, rather than of citizenship of the United States, and that the State has plenary power to pre- [fol. 40] scribe, through the Regents, the terms upon which students may be admitted. But it must be kept in mind that your student petitioners were, until suspended, students of approved moral character, and in good standing in all respects with the single exception that they declined to abandon their Methodist religious faith and their consciences. That being true (and it is not denied, as none of the allegations of the petition is denied) it seems clear that their suspension solely because of their refusal to be forcibly impressed into service in a Federal military organization, into which the Federal government itself, under existing law, may not force these young men, is nothing short of an abridgement of their immunities as citizens of the United States.

We assume that it is not necessary to argue here that the language of the Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

means not only that the State shall not by legislative enactment, but that it shall not, by any of its agencies, legislative, executive, administrative, or judicial, act to abridge

those immunities. Construing the equal protection clause of the Fourteenth Amendment, the Supreme Court in Ex parte Virginia, 100 U. S. 347, 25 L. Ed. 676, says:

[fol. 41] "These provisions have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

In our case the state has acted through its agents, the Regents, the President and the Provost of the University. We submit therefore, that by the action of the Provost in suspending these students for their refusal to forswear [fol. 42] their consciences and their religion, the State of California has abridged their privilege and immunity from enforced service in a branch of the Federal military establishment, in violation of the Fourteenth Amendment.

III

Suspension of these students because of their conscientious objection to war and military training amounts to denial of their right to the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Those whose religious and conscientious scruples permit them to accept enforced service in the Federal Reserve Officers Training Corps, and enforced training for war, are afforded the protection, the benefit, of the laws, establishing and governing the University for the education of all the youth of the state. Petitioners, because their devotion to conscience and their religion, are denied that benefit and protection of the laws of their State. Time and space

do not permit the argument of this point at greater length. We urge it, and rely upon it.

IV

Enforcement of compulsory military training, and suspension of these students because they respectfully decline to submit to it, prohibits the free exercise of religion, in violation of the First Amendment and of the Fourteenth [fol. 43] Amendment's provision that no state shall deprive any person of liberty without due process of law.

The suspension of these petitioners denies them the education to which they are entitled under the Constitution and laws of California, solely because of their refusal to violate their consciences and deepest moral and religious convictions. We submit that this is a denial of religious liberty—a prohibition of the free exercise of religion. That the Fourteenth Amendment extends the protection of the First Amendment to include protection against state incursion upon the liberties therein guaranteed, we have hereinabove shown, in our discussion in Paragraph I. And we have discussed the meaning of religious liberty in the paragraphs touching the guaranty of freedom of religion and of conscience under the Constitution of California. We refer the Court to those paragraphs for amplification of the thoughts expressed herein.

V

Compulsory military training, when imposed upon religious and conscientious objectors, to war and military training, deprives them of their liberty without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 44] Time and space do not permit extended argument of this point. We urge it and rely upon it.

VI

Compulsory military training conflicts with Federal law, which is a part of the supreme law of the land.

The University of California is a Land Grant College, under the terms of the Morrill Act (Act of Congress approved July 2, 1862) by which large tracts of land were granted by the Federal Government to our State in con-

sideration of the "endowment, support and maintenance of at least one college of agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and mechanic arts". The Morrill Act, passed in the midst of the Civil War period, does not require that courses in military tactics shall be compulsory. It has been amended several times, after discussion of the absence, in its text, of any requirement that the military courses be compulsory, and the language providing for such courses has not been changed. So that it is logical to conclude that Congress intended that military training should not be made compulsory in the Land Grant colleges. [fol. 45] In Section 9, Article IX of the California Constitution it is provided that military tactics shall be taught at the University "in accordance with the requirements and conditions" of the Morrill Act. That compulsory courses are not required by that law has twice been held by the attorneys general of the United States. (See Opinions of the Attorney General, 1923 and 1930.) So we contend that making military training compulsory is not in accordance with the requirements and conditions of the Land Grant College Act.

Further in support of that proposition, we point out Congress always has recognized and respected the rights of conscientious objectors, and has exempted them from combatant service in every war. In the world war, Congress by statute authorized the President to determine what service might be demanded of conscientious objectors, and by executive order President Wilson excused from every kind of military service those whose religious and conscientious scruples restrained them from such service. Many were interned in concentration camps, with no military duties. Many others were furloughed for work on the Country's farms. All of these facts seem to support the conclusion that Congress, in establishing the R. O. T. C., intended that membership therein should be entirely voluntary.

[fol. 46] VI (c)

Compulsory military training, announced by the University as being primarily for the purpose of training offi-

cers for the United States Army, violates the spirit if not the letter of the Kellogg Pact of 1928, a part of the supreme law of the land.

In that treaty the United States led more than fifty other nations in a solemn contract never to resort to other than pacific means in the settlement of international differences. We are not unmindful that the Federal government may, as all sovereigns may and many do, violate treaty obligations. But individual states of the Union may not. They, and their law-making, law-enforcing and law-interpreting agencies are bound by treaties as a part of the supreme law of the land, as they are denominated by Article VI of the Constitution.

For the foregoing reasons, we urge that a hearing on the merits of this case should be granted, with full opportunity to both sides to be heard in oral argument and upon briefs, and that finally this Court's peremptory writ of mandate should issue, requiring the reinstatement of your student petitioners in the University of California at Los Angeles.

Respectfully submitted, John Beardsley, Attorney for Petitioners.

Dated Los Angeles, December 29th, 1933.

[fol. 47] Affidavit of Service by Mail (1013a C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

E. M. Mullin being first duly sworn says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 610 Rowan Building, Los Angeles, California; that on the 30th day of December, 1933, affiant personally deposited in the United States Postoffice at Los Angeles, postage prepaid, a true and full copy of the foregoing Petition for rehearing, addressed to John U. Calkins, Jr., Esq., Attorney for the Regents of the University of California, Crocker Building, San Francisco, California.

E. M. Mullin.

Subscribed and sworn to before me this 30th day of December, 1933. Charles E. Beardsley, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 48] IN SUPREME COURT OF CALIFORNIA, IN BANK, JANUARY 8, 1934

(e)

L. A. No. 14573

ALBERT W. HAMILTON, etc., et al., Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (a Corporation) et al., Respondents

[1] School Law—University of California—Board of Regents—Constitutional Law.—Section 9 of article IX of the Constitution reposes in the Regents of the University of California full powers of organization and government of the university, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds.

[2] Id.—University of California—Courses of Study—Military Tactics.—By the provisions of the organic act creating the University of California, and by section 9 of article IX of the Constitution, military tactics is expressly required to be included among the subjects which shall be taught at the university, and the regents have full power and authority, and it is their duty to prescribe the nature and extent of the course to be given, and to determine the question of what students shall be required to pursue them.

[fol. 49] [3] Id.—Miltary Tactics—Constitutional Law.—In this proceeding for a writ of mandate to compel the reinstatement of petitioners to the University of California, they having been suspended by reason of their failure and refusal to pursue therein certain compulsory courses in military training prescribed by the regents, there was involved in the cause no violation of rights assured to petitioners by the Constitution of the United States.

Application for writ of mandate prayed to be directed to the Regents of the University of California to compel the reinstatement of petitioners suspended for refusal to pursue certain compulsory courses in military training. Writ denied.

Application for rehearing (no opinion) denied.

For Petitioners—John Beardsley.

For Respondents—John U. Calkins, Jr.

OPINION ON PETITION FOR REHEARING

This court denied an application of the petitioners, Albert W. Hamilton and W. Alonzo Reynolds, Jr., for a writ of mandate to require the Regents of the University of California to readmit them to the University of California at Los Angeles as students, they having been suspended from the university by reason of their failure and refusal to pursue therein certain compulsory courses in military training prescribed by the Regents of the University of California. Petitioners have filed a petition for rehearing.

[1] The Constitution of the state of California (art. IX, sec. 9) reposes in the Regents of the University of California full powers of organization and government of the university, "subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds".

[2] By the provisions of the organic act creating the university (Stats. 1868, p. 248, sec. 6), and by the above section of the Constitution, military tactics is expressly required to be included among the subjects which shall be taught at the university. The regents have full power and authority, and it is their duty, to prescribe the nature and extent of the courses to be given, and to determine the question of what students shall be required to pursue them.

[3] We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States. (Pearson v. Coale et al., 167 Atl. [Md.] 54; 54 Sup. Ct. Rep. 131 [Coale v. Pearson et al.].)

The petition for rehearing does not contain facts sufficient to entitle petitioners to the relief sought.

Petition for rehearing is denied.

Waste, C. J.

We concur:
Seawell, J.; Shenk, J.; Curtis, J.; Preston, J.; Langdon, J.; Thompson, J.

[fol. 50] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

(f)

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed May 19, 1934

PETITION FOR APPEAL

To the Honorable the Supreme Court of the United States:

Considering themselves aggrieved by the final decision of the Supreme Court of the State of California, rendered in said Court on January 8, 1934, petitioners and appellants, Albert W. Hamilton, a minor, by Albert Hamilton, his guardian ad litem, W. Alonzo Reynolds, Jr., a minor, by W. Alonzo Reynolds, his guardian ad litem, Albert Hamilton and W. Alonzo Reynolds, hereby pray that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond as security for costs thereon, and for an order approving said bond.

[fol. 51] ASSIGNMENT OF ERRORS

And the said petitioners and appellants assign the following errors in the record and proceedings in the said case:

1. The court below erred in holding that the Organic Law of the University of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, does not violate their rights under the due process clause of the Fourteenth Amendment.

2. The court below erred in holding that Article IX, Section 9 of the Constitution of the State of California, applied so as to authorize the Regents of the University to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, does not violate their rights under the due process clause of the Fourteenth Amendment.

3. The court below erred in holding that the regulations of the Regents of the University of California, applied so as to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, does not violate their rights under the due process clause of the Fourtenth Amendment.

4. The court below erred in holding that the Organic Act of the University of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, does not abridge their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

[fol. 52] 5. The court below erred in holding that Article IX, Section 9 of the Constitution of the State of California, construed as authorizing the Regents of the University to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps did not abridge their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

6. The court below erred in holding that the regulation of the Regents of the University of California applied so as to suspend petitioners and appellants herein from the University of California solely because they refused upon conscientious and religious grounds to participate in military drill in the Reserve Officers' Training Corps does not

abridge their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

7. The court below erred in holding that the Organic Law of the University of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps is not contrary to the Treaty of the United States known as the Kellogg Pact of 1928.

8. The court below erred in holding that Article IX, Section 9 of the Constitution of the State of California, applied so as to authorize the Regents of the University to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps is not violative of the Treaty of the United States known as the Kellogg Pact of 1928.

[fol. 53] 9. The court below erred in holding that the regulation of the Regents of the University of California applied so as to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds to participate in military drill in the Reserve Officers' Training Corps is not violative of the Treaty of the United States known as the Kellogg Pact of 1928.

10. The court below erred in holding that in suspending petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, the Regents of the University have not violated petitioners' and appellants' rights under Article VI, Clause 2 of the Constitution of the United States and under the Fourteenth Amendment thereof.

11. The court below erred in failing to hold that the Organic Law of the University of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the

Reserve Officers' Training Corps violates their rights under the due process clause of the Fourteenth Amendment.

12. The court below erred in failing to hold that Article IX, Section 9 of the Constitution of the State of California, applied so as to authorize the Regents of the University of California to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, violates their rights under the due process clause of the Fourteenth Amendment.

13. The court below erred in failing to hold that the regulations of the Regents of the University of California applied so as to suspend petitioners and appellants herein from the University solely because they refused, upon con- [fol. 54] scientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, violates their rights under the due process clause of the Fourteenth Amendment.

14. The court below erred in failing to hold that the Organic Act of the University of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, abridges their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

15. The court below erred in failing to hold that Article IX, Section 9 of the Constitution of the State of California, construed as authorizing the Regents of the University to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, abridges their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

16. The court below erred in failing to hold that the regulation of the Regents of the University of California applied so as to suspend petitioners and appellants herein from the University of California solely because they

refused upon conscientious and religious grounds to participate in military drill in the Reserve Officers' Training Corps abridges, their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment.

17. The court below erred in failing to hold that the Organic Law of California (Statutes 1868, p. 248, Section 6), applied so as to authorize the suspension of petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to [fol. 55] participate in military drill in the Reserve Officers' Training Corps is contrary to the Treaty of the United States known as the Kellogg Pact of 1928.

18. The court below erred in failing to hold that Article IX, Section 9 of the Regents of the University to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, is violative of the Treaty of the United States known as the Kellogg Pact of 1928.

19. The court below erred in failing to hold that the regulation of the Regents of the University of California, applied so as to suspend petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps is violative of the Treaty of the United States known as the Kellogg Pact of 1928.

20. The court below erred in failing to hold that in suspending petitioners and appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers' Training Corps, the Regents of the University have violated petitioners' and appellants' rights under Article VI, Clause 2 of the Constitution and under the Fourteenth Amendment thereof.

21. The court below erred in refusing to grant a writ of mandate requiring the Regents to reinstate petitioners and appellants herein as students of the University of California.

[fol. 56] PRAYER FOR REVERSAL

For which errors the petitioners and appellants pray that the said judgment of the Supreme Court of the State of California, dated December 11, 1933, denying relief to the petitioners, and the decision and judgment of said Supreme Court of California, dated January 8, 1934, in the above entitled cause, denying the petition for rehearing, be reversed and a judgment rendered in favor of the said petitioners and appellants, and for costs, and for all other proper relief.

Dated April 3, 1934.

John Beardsley, Attorney for Petitioners and Appellants. Gregory Hankin, Woodward Building, Washington, D. C., of Counsel.

[fol. 57] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

(g)

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 19, 1934

The petitioners and appellants, Albert W. Hamilton a minor, by Albert Hamilton, his guardian ad litem, W. Alonzo Reynolds, Jr., a minor, by W. Alonzo Reynolds, his guardian ad litem, Albert Hamilton, and W. Alonzo Reynolds, in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and rendered in the above entitled cause by the Supreme Court of the State of California, on December 11, 1933, and from the order and judgment made and rendered by the said Court on January 8, 1934, denying the petition of said petitioners [fol. 58] for a rehearing of said cause, and from each and every part of said judgment and order denying rehearing, and having presented and filed their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of California, in the above entitled cause, as provided by law, and

It is further ordered that the Clerk of said Supreme Court of the State of California shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within sixty days from this date, and

It is further ordered that security for costs on appeal be fixed in the sum of $500.

Dated April 6th, 1934.

Geo. Sutherland, Justice of the Supreme Court of the United States.

Memorandum.—Whether the validity of a state statute was here drawn in question, or whether a "statute," within the meaning of 237(a) of the Judicial Code, was involved, are matters which are by no means clear on the record presented to me. The question on the merits, however, is novel and important, and the time for an appeal expires on Monday next. It seems to me best, under the circumstances, to take the responsibility of allowing the appeal, leaving myself entirely free to deal hereafter with the questions as a member of the court as I may be advised upon further consideration.

[fols. 59-61] Bond on appeal for $500.00, approved and filed May 19, 1934, omitted in printing.

[fol. 61a] Citation in usual form showing service on John U. Calkins, Jr., filed May 19, 1934, omitted in printing.

[fol. 62] IN SUPREME COURT OF CALIFORNIA

(j)

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed May 19, 1934

It is hereby stipulated by and between the attorneys for the parties in the above entitled cause that the papers to be

presented to the Supreme Court of the United States by the Clerk of the Supreme Court of California pursuant to an order of the Honorable George Sutherland, Associate Justice of the Supreme Court of the United States, dated and issued on April 6, 1934, are the following, and that this stipulation shall take the place of the præcipe required to be filed by counsel for the respective parties under and pursuant to Rule Ten of the Rules of the Supreme Court of the United States.

(a) Petition for writ of mandate;
(b) Memorandum of points and authorities filed with the petition for writ of mandate;
(c) Order of the Supreme Court of California of December 11, 1933, denying petition for writ of mandate;
(d) Petition for rehearing;
[fols. 63-83] (e) Order denying petition for rehearing, and opinion of the Court thereon;
(f) Petition for leave to appeal, together with assignment of errors and prayer for reversal;
(g) Order allowing appeal;
(h) Bond for costs on appeal;
(i) Citation, with acknowledgment of service;
(j) The present stipulation;
(k) Acknowledgment of service;
(l) Statement as to jurisdiction.

It is further stipulated that the papers annexed hereto are true and correct copies of the papers described in paragraphs (a) to (l) inclusive of this stipulation; that with this stipulation they constitute the complete transcript of the record to be certified to the Supreme Court of the United States at Washington, and that the Clerk of the Supreme Court of California may certify this transcript of record and other papers without further formality.

John Beardsley, Attorney for Appellants. John U. Calkins, Jr., Attorney for Appellees.

[File endorsement omitted.]

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 23, 1934

Come now the appellants in the above entitled cause and adopt their assignments of error as their statement of the points to be relied upon in the argument in this Court.

Appellants further represent that the whole record, as filed, is necessary for the consideration of the case.

Gregory Hankin, Counsel for Appellants.

Dated May 23, 1934.

[fol. 86] [File endorsement omitted.]

Endorsed on cover: File No. 38,679. California Supreme Court. Term No. 55. Albert W. Hamilton, by Albert Hamilton, His Guardian ad litem, W. Alonzo Reynolds, Jr., by his Guardian ad litem W. Alonzo Reynolds, et al., Appellants, vs. The Regents of the University of California, Robert Gordon Sproul and Ernest Carroll Moore. Filed May 21, 1934. File No. 38,679. 55, O. T. 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 1076

ALBERT W. HAMILTON, A MINOR, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, ET AL.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellants submit this statement showing that the appeal in the above entitled cause is properly before this Court.

Opinion Below.

The opinion of the Supreme Court of California (R. 48-9) is reported in 87 Cal. Dec. 88.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(1) Appeal Timely Taken.

The order from which this appeal is taken was entered on January 8, 1934 (R. 84). A petition for appeal accompanied by assignments of error was, on March 8, 1934, presented to the Hon. William H. Waste, Chief Justice of the Supreme Court of California, and was by him denied on March 12, 1934. A petition for appeal was then presented to Mr. Justice Sutherland and was by him allowed on April 6, 1934 (R. 58).

(2) Finality of Judgment.

The judgment forming the basis of the appeal is final both in form and in substance and disposes of all the elements of the controversy in the court below.

(3) Judgment of the Highest Court.

The judgment of the Supreme Court of California is that of the highest court in which, under the laws of the state, such judgment could be had. The case originated with a petition for writ of mandate filed in the Supreme Court of the state as a court of original jurisdiction. The court denied the writ, and there is no appeal or other proceeding which can be had in the courts of the State of California.

(4) Validity of State Statutes Drawn Into Question and Decision in Favor of Their Validity.

In this case appellants contended in the court below that certain state statutes, as applied, were repugnant to the Constitution of the United States, and the decision rendered by the court below was in favor of their validity.

(a) *The Statutes.*

The statutes whose validity was drawn into question are:

(i) The Organic Act creating the University of California (Statutes 1868, p. 248, Sec. 6) provides as follows:

> The University shall have for its design, to provide instruction and complete education in all the departments of science, literature, art, industrial and professional pursuits, and general education, and also special courses of instruction for the professions of agriculture, the mechanic arts, mining, military science, civil engineering, law, medicine and commerce, and shall consist of various colleges; * * *
>
> SECTION 3 * * * Any resident of California of the age 14 years or upwards, of approved moral character, shall have the right to enter himself in the University as a student at large * * * on such terms as the Board of Regents may prescribe.

(ii) Article IX, Section 9 of the Constitution of the State of California which provides:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. * * *

(iii) Pursuant to the above provisions of the Organic Act and of the Constitution of the State of California, the Regents of the University of California on September 15, 1931, had promulgated an order (R. p. 3, lines 15-25) requiring that,

> "Every able bodied student of the University of California who, at the time of his matriculation at the University, is under the age of twenty-four years and a citizen of the United States and who has not attained full academic standing as a junior student in the University and has not completed the course in military science and tactics offered to freshmen and sophomore students at the University shall be and is hereby required as a condition to his attendance as a student to enroll in and complete a course of not less than one and one-half units of instruction in military science and tactics each semester of his attendance until such time as he shall have received a total of six units of such instruction or shall have attained full academic standing as a junior student."

The rules and regulations of The Regents of the University of California have the same force and effect with reference to matters pertaining to the University as the acts of the legislature of the State of California have with reference to the state. Except as to investment of University funds as above provided in Article IX, Section 9 of the Constitution, the acts of the Regents have superior force to those of the legislature of the state with reference to matters pertaining to the University.

Williams v. *Wheeler,* 23 Cal. App. 619.

Looking at it in a light most favorable to the appellees, the regulation is "an order, legislative in character, made by a state bureau," and therefore is a "statute" within the meaning of the Jurisdictional Act of 1925.

Sultan Railway and Timber Co. v. *Department of Labor and Industries,* 277 U. S. 135, 136.

King Manufacturing Co. v. *City of Augusta,* 277 U. S. 100, 113.

The Supreme Court of California interpreted the Act of 1868 and Article IX, Section 9 of the Constitution as au-

thorizing the Board of Regents to make the above regulation and to apply it in the manner in which it was applied in the present case.

(b) *Application of the Statutes.*

Pursuant to the above provisions the University authorities required all able-bodied male students who are citizens of the United States to attend courses in military training prescribed by the War Department for infantry units of the Senior Division of the Reserve Officers Training Corps, the primary object of which is "to qualify students for appointment in the Officers Reserve Corps of the United States Army". These courses include instruction in rifle marksmanship, scouting and patrolling, drill and command, musketry, combat principles and use of automatic rifles. Arms, equipment and uniforms for the use of the students in said courses are furnished by the War Department of the United States Government. (R. 3, lines 19-25.)

Appellants herein, as members of the Methodist Episcopal Church, have adopted and feel themselves morally, religiously and conscientiously bound by the tenets and principles of the said Church. Each of them is a follower of the teachings of Jesus Christ, accepting as a guide for his life the teachings of Jesus and of the Bible, and believes that war and training for war and military training are immoral and wrong, and contrary to the letter and spirit of the teachings of Jesus and of the precepts of the Christian religion (R. 4).

We stress these facts because in the case of Pearson v. Coale et al., 167 *Atl.* 54, *the Court of Appeals of Maryland intimated that the conscientious scruples of the appellees therein were a pretense, rather than the cause, for refusal to attend military training. Not so in this case. The above facts were set forth in the petition for writ of mandate, and*

they have never been controverted, either by pleadings or otherwise.

Appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., had enrolled in the University on or about October 1, 1933, and were in good standing (R. 2, lines 18-25). Soon after their matriculation they petitioned the University authorities for exemption from military training in the R. O. T. C. on the ground that participation in such military training was contrary to their religious and moral beliefs. Their petition was denied (R. 7, lines 4-12). The Bishop of the Methodist Episcopal Church in California and others then petitioned the Regents of the University of California to make military training optional rather than compulsory, and to exempt appellants herein from compulsory service in the R. O. T. C., and not to cause the appellants herein to violate and foreswear their conscientious and religious beliefs (R. 7, lines 12-25). That petition was likewise denied (R. 8, lines 1-7). Appellants then respectfully declined to participate in military drill and they were suspended from attendance at the University (R. 8-9). Thus the statutes were applied.

(c) *Nature of the Case.*

Appellants then brought this suit for writ of mandate in the Supreme Court of California to compel appellees to reinstate appellants as students of the University, alleging the above facts. They claimed that under the constitution and laws of the State of California the appellees herein had no power or authority to compel appellants to attend courses in military instruction in the R. O. T. C. and that if, under the law of California, the appellees have such authority, then such authority is contrary to and violates appellants' constitutional rights under the Federal Constitution (R. 9-10). No answer or other pleading was filed in behalf of appellees or any of them.

By order dated December 11, 1933, and without affording appellants an oppoortunity to be heard, the petition for writ of mandate was denied (R. 84). Appellants then filed a petition for rehearing. On January 8, 1934, the Supreme Court of California rendered an opinion and order denying the petition for rehearing, holding that under Article IX, Section 9, of the Constitution and under the Organic Act creating the University, the appellees had the power and authority to promulgate and enforce the above rules and regulations and that none of the appellants' rights guaranteed by the Constitution of the United States had been violated thereby (87 Cal. Dec. 88).

(d) *Constitutional Questions Timely and Sufficiently Raised.*

At the outset we should like to make clear the distinction between the regulation of the Regents requiring students to attend courses in military training for at least two years, and the orders of the University authorities requiring drilling in the R. O. T. C. and suspending appellants for refusal to comply. It is the former regulation that we call a "statute" within the meaning of *Sultan Railway & Timber Co.* v. *Department of Labor and Industries, supra.* The latter orders are applications of the former, and are not here included under the term "statute". In view of the fact that under the practice in California, the statutes are not set out in the pleadings, both types of orders were paraphrased, and the language in which the validity of the statute was drawn into question in the petition for writ of mandate is perhaps not as precise as it would have been, had the statute been specifically referred to as being violative of the specific provisions in the Constitution of the United States. But the law sets no formula for "drawing into question" the validity of a statute.

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

In the petition for mandate, appellants referred to the requirement of "enrollment and participation in said courses in military training for at least two years of all able-bodied male students who are citizens of the United States" (R. 3, lines 16-19), and claimed that this requirement, as applied, violated appellants' rights "under the constitution and laws of the State of California, and of the United States." The specific claims of invalidity of the requirement under the federal constitution are set forth in the "Memorandum of Points and Authorities" filed together with and referred to in (p. 10, lines 5-7) the petition. These appellants claimed violation of rights under Sec. 1 of the Fourteenth Amendment (p. 17, lines 25-26; p. 18, lines 18-26) and that the regulation also violated the supreme law of the land embodied in the Kellogg Pact (p. 20).

The claims of invalidity of the regulation referred to as the "statute", however, are so interwoven with the claims of invasion of federal rights by the application of the statute, that appellants do not rest upon the claim that the validity of the statute was drawn into question in the peti-

tion for mandate. There is no doubt, however, that the claims of right under the constitution and treaty are sufficient for sustaining the jurisdiction for certiorari under Sec. 237(*c*) of the Judicial Code.

Citizens National Bank v. *Durr*, 257 U. S. 99, 106-7.

Before any answer or other pleading was filed by the appellees, the petition for writ of mandate was denied, without an opinion (R. 84). Appellants then filed a petition for rehearing which was likewise denied, but with an opinion by the court (R. 49). In that opinion, the Supreme Court of California held that under the Organic Act of the University (Act of 1868) and under Article IX, Section 9 of the State Constitution, the Regents had "full power and authority * * * to prescribe the nature and extent of the courses to be given, and to determine the question of what students shall be required to pursue them." The court then said that it found in the cause "no violation of rights assured to the petitioners by the Constitution of the United States."

A fair implication of the language used in the opinion is that the statutes, *i. e.* the Act of 1868 and Article IX, Section 9 of the Constitution, as applied by the Regents, did not violate constitutional rights. If so, the validity of the statutes was "drawn into question" by the court below, and it is immaterial whether the appellants themselves had raised constitutional questions.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 407.
Silver v. *Silver*, 280 U. S. 117, 122.
Mallinckrodt Works v. *St. Louis*, 238 U. S. 41, 49.

Assuming, however, that the language used in the opinion is to be construed strictly against the appellants, to mean that "no violation of rights" was involved irrespective of the statutes as applied, appellants will proceed

to show that they had timely "drawn into question" the validity of the statutes in their petition for rehearing, even if the court below had not, in its opinion denying the petition for rehearing, touched on the federal questions.

Missouri ex rel. Missouri Insurance Company v. *Gehner*, 281 U. S. 313, 320.

The validity of all the three statutes, as applied, was drawn into question. First, we shall take the Act of 1868 and Article IX, Section 9, the statutes delegating governmental powers to the Regents. These statutes were specifically set forth in the petition for rehearing (pp. 26-7). Appellants then claimed that these statutes could be valid only if the powers delegated therein were not exercised arbitrarily and unreasonably (p. 27). Appellants then proceeded to test the validity of the application of these statutes under the California Constitution (pp. 28-30). But it is evident that appellants did not intend to rest on their claim that these statutes were invalid only under the California Constitution. After discussion of the proposition that invasion of the rights of religious liberty by this arbitrary and unreasonable application of the statutes was contrary to the First Amendment (pp. 31-33), appellants proceeded to show that this right was protected by the due process clause of the Fourteenth Amendment (p. 33) in the same manner as freedom of speech, of the press, and of contract (pp. 33-37). Thus the two statutes were drawn into question under the due process clause.

The validity of the third "statute," that is, the legislative order of the Regents, was also drawn into question under the due process clause of the Fourteenth Amendment. The legislative order of the Regents is embodied in or referred to on p. 23, lines 19-22, Petition for Rehearing. On pp. 42-43, appellants argued that compulsory military training, as applied, was contrary to the due process clause of

the Fourteenth Amendment, by referring to and adopting (p. 43, lines 10-14) the discussion concerning the invalidity of the other two statutes under the state constitution.

The argument under the "privileges and immunities clause" of the Fourteenth Amendment (pp. 37-42) refers to the "suspension" of the appellants from the University. In other words, it is an attack on the application of the statutes. In view of the fact, however, that the statutes had already been drawn into question under the Fourteenth Amendment—and for purposes of jurisdiction, it was not necessary to specify the particular clause of the Fourteenth Amendment—the attack on the application of the statutes under the privileges and immunities clause was part of the attack on the validity of the statutes themselves, as applied, under the Fourteenth Amendment.

The "statute" referred to as the regulation of the Regents is directly drawn into question as being in conflict with the Kellogg Pact (p. 44). Here the appellants claimed that not merely their suspension from the University, or the requirement that they attend the R. O. T. C. drill, but that the compulsory military training violated the Kellogg Pact. On p. 24 of the petition for rehearing, the validity of Article IX, Section 9 of the State Constitution was also drawn into question as being contrary to the treaty and, therefore, to the supreme law of the land.

(5) Scope of Jurisdiction on Appeal.

We have assigned as error (R. 51-55) the ruling of the court below that the statutes and regulation as applied did not violate appellants' rights under the due process clause and privileges and immunities clause of the Fourteenth Amendment and that they did not transgress the supreme law clause in Article VI, Cl. 2 of the Constitution.

(a) *Application of the Statutes Without Due Process.*

This Court has jurisdiction on appeal to determine whether a state statute, not invalid on its face, is unconstitutionally applied.

Fiske v. *Kansas*, 274 U. S. 380, 385.
Panhandle Oil Co. v. *Knox*, 277 U. S. 218, 222.
Quaker Cab Co. v. *Pennsylvania*, 277 U. S. 389, 401.

In this case appellants are not contending that the state may not, consistently with the due process clause, organize a university and delegate to the Regents the authority to make all rules necessary and proper for the administration of such educational institution. Nor do appellants maintain here that a statute authorizing the Regents to make rules providing courses in military instruction is violative of the due process clause. Appellants do not maintain here that under no circumstances may the Regents, consistently with the due process clause, *require* the attendance of students in courses of military science or tactics. Appellants *do contend* that the requirement of attendance in such courses by students whose religious and moral convictions forbid them to participate in such instruction is so arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment.

There is no express provision in the Constitution guaranteeing freedom of religion from encroachments by the states. The principle of religious freedom, however, is so deeply imbedded in our fundamental concepts of justice that any invasion of it must be considered contrary to the due process clause of the Fourteenth Amendment.

Snyder v. *Massachusetts*, No. 241, October Term, 1933, decided January 8, 1934.

The principle that the limitations in the First Amendment against violations of freedom of speech and of the

press are also limitations on the powers of the states under the due process clause of the Fourteenth Amendment,

Stromberg v. *California,* 283 U. S. 359.
Near v. *Minnesota,* 283 U. S. 697.

applies, we submit, equally to freedom of religion.

Although in the earlier cases, like *Permoli* v. *First Municipality,* 3 How. 609, and *United States* v. *Cruikshank,* 92 U. S. 542, this Court has held that the guaranty against encroachments on freedom of religion in the First Amendment was a guaranty against the Federal government, and not against the states, the later cases above cited clearly indicate that the guaranty of such fundamental rights as freedom of speech and of the press is protected by the due process clause of the Fourteenth Amendment. In *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and *Pierce* v. *Society of Sisters,* etc., 268 U. S. 510, 535, this Court intimated that religious liberty is one of the liberties protected by the due process clause of the Fourteenth Amendment. However, this Court has never had occasion to pass directly on this question. We think it is one of great importance and should be determined by this Court. Surely, if, as this Court held in *Adkins* v. *Children's Hospital,* 261 U. S. 525, the freedom of contract may not be interfered with, under the Fourteenth Amendment, it would seem clear that freedom of religion would likewise be protected. After all, whatever may be the doubts that this country came into being for the purpose of exercising freedom of contract, there is no doubt that it came into being for the purpose of establishing freedom of religion.

(b) *Abridgment of Priviliges and Immunities.*

In addition, appellants maintain that the above statutes and the regulations made thereunder abridge the privileges and immunities enjoyed by the appellants as citizens of the

United States. In this connection appellants do not maintain that citizens of the United States are not subject to call for military service, or that the United States Government may not in times of war compel military service as part of the program of preparedness for war. Appellants do contend that as citizens of the United States *they may not be forced into any branch of the federal military service without appropriate Congressional action.* The Constitution gives *Congress* the power to raise and support armies.

Selective Draft Cases, 246 U. S. 366, 377.

Until there is such Congressional action, the citizens of the United States are privileged and immune from being compelled to serve in the military forces of the United States.

The R. O. T. C. is a part of the military forces of the United States. It was organized under an act of Congress (10 U. S. C. 381). This act authorizes the President to organize and maintain a Reserve Officers Training Corps in educational institutions specially designated by the Secretary of War. The War Department furnishes officers of the regular army as instructors in military science and tactics and also provides the necessary equipment. It was not the intention of Congress to provide that the students taking military instruction in the R. O. T. C. in State institutions should be compelled to take this instruction.

36 Opinions of Attorney General 297.

That Congress did not intend that this military instruction be made compulsory in State institutions, is evident from another provision in the same act authorizing the establishment of R. O. T. C. units in private educational institutions where the courses may be made either elective or compulsory. The omission of such provisions with reference to the establishment of R. O. T. C. units in State

institutions was evidently in recognition of the well known rule of constitutional law that States and their agencies, but not private persons, are restrained by Section 1 of the Fourteenth Amendment.

At the University of California, military science and tactics are taught, and military training and drill are required of students as members of the R. O. T. C. That organization is no part of and has no connection with the military establishment of the State of California. The State's military code contains no mention of or reference to the R. O. T. C.

Appellants do not find it necessary to argue in this case that the State may not compel its citizens to do military service in times of peace for the State's own purposes and in the State's own organizations. But, where the State undertakes to compel citizens of the United States to do *an act for Federal purposes,* it is subject to the same limitations as are imposed by the Constitution on the Federal Government.

Gambino and Lima v. *United States,* 275 U. S. 310.

The Federal Government cannot compel appellants to do military service in any branch of the military department of the United States without appropriate Congressional action. And any compulsion by the State in this regard is an abridgment of privileges and immunities contrary to the Fourteenth Amendment.

The stock answer to this argument is that if the appellants do not wish to participate in military drill, contrary to their religious convictions, let them go elsewhere, that the State need not grant them the advantages of education, if they do not wish to comply with this condition. While we do not intend to argue the case on the merits, in this statement as to jurisdiction, but only to point out that the Federal question here presented is not so unsubstantial

that the appeal should be dismissed for the want of a substantial Federal question, it is apt to point out that a State may not grant a right or even a privilege conditioned upon a surrender of constitutional rights or of privileges and immunities of citizens of the United States.

Home Insurance Co. v. *Morse*, 20 Wall. 445, 456.

Frost v. *Corporation Commission of Oklahoma*, 278 U. S. 515.

(c) *Supreme Law of the Land.*

Whether the right of the State of California to compel those students of the University who are citizens of the United States to serve in any branch of the military forces of the United States should be given broad or narrow construction is a question which should be considered in the light of the policies of the United States. We submit that compulsory military training, announced by the University as being primarily for the purpose of training officers for the United States Army, violates the spirit, if not the letter, of the Kellogg Pact of 1928, which is a part of the Supreme Law of the Land. In that Treaty, the United States led more than fifty nations in a solemn compact never to resort to other than pacific means in the settlement of international differences. This Treaty should be given a liberal construction in determining how far the states may impinge this policy of the federal government.

Jordan v. *Tashiro*, 278 U. S. 123, 127.

It has long been recognized that as a necessary step to the preservation of peace among nations, armaments should be limited. We are not unmindful of the rule that the federal government may, as all sovereigns may, violate treaty obligations. The federal government may adopt a program of preparedness in order to guard itself against possible violations of the Kellogg Pact by other

nations. But the states of the Union are bound by the treaties as a part of the Supreme Law of the Land.

WHEREFORE it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

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(5012-C)

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No. 55

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5 Corpus Juris p. 297	16
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 55

ALBERT W. HAMILTON, A MINOR, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, ET AL.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

BRIEF OF APPELLANTS.

Citation of Opinion of Court Below.

The opinion of the Supreme Court of California (R. 29-30) is reported in 87 Cal. Dec. 88.

Statement as to Jurisdiction on Appeal.

The statement as to jurisdiction on appeal is separately printed and on file with the clerk. We think it demonstrates that this Court has jurisdiction of this case on appeal. Certainly it does show that substantial Federal questions

were presented to the State court, and that the appeal was timely taken; that the judgment of the Supreme Court of California is final both in form and in substance and disposes of all of the elements of the controversy in the court below; that the judgment of the Supreme Court of California is that of the highest court in which, under the laws of the State, such judgment could be had, and that appellants contended in the court below that certain State statutes, as applied, were repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity.

If for any reason the Court should find it necessary to hold that appellants have mistaken their remedy and proceeded by appeal when they should have petitioned for certiorari, we think it is clear under the statutes and the rules of this Court that the case should be considered as if it had come up on certiorari, and dealt with on its merits.

The citation on appeal, issued by Mr. Justice Sutherland, after allowing the appeal, serves the purpose of a writ of certiorari and has brought the record of the Supreme Court of California to this Court.

For argument as to jurisdiction we respectfully refer the Court to the printed statement as to jurisdiction on appeal.

Statement of the Case.

Primarily the purpose of this appeal is to test the constitutionality of California statutes requiring compulsory military training of all able-bodied male students who are citizens of the United States, regardless of their conscientious and religious objections to war and military training, and their privileges and immunities as citizens of the United States.

Superficially this case is similar to *Coale* v. *Pearson,* in which this Court dismissed an appeal from the Maryland Court of Appeals in November, 1933.

Fundamentally the two cases are sharply distinguishable, as we shall show, and the *Coale* case is not in any sense a controlling precedent.

The California statutes, the validity of which is drawn into question, are (a) Section 9 of Article IX of the State Constitution, (b) the Organic Act creating the University of California (Stats. 1868, P. 248, Sec. 6), and (c) the Resolution or Order of the Regents of the University of September 15, 1931, requiring compulsory military training. Each of these statutes is discussed hereinafter.

The questions of law presented by this appeal have never been pased upon by this Court. *United States* v. *McIntosh*, 283 U. S. 605, 75 L. Ed. 1302, dealt with the question of religious liberty as applied to aliens seeking naturalization, but not as applied to native born citizens, as are the appellants herein. In the *McIntosh* case this Court held substantially that an alien seeking citizenship must promise under oath to bear arms in case of war in defense of the Constitution and of the United States. No such question is involved here. The question here is whether college students who are citizens of the United States and active members of the Methodist Episcopal Church and affiliated organizations, may be compelled to surrender their convictions of conscience and of religion and their privileges and immunities as citizens of the United States, or, for their refusal so to do, be denied education at the hands of their State University, to which they are in all other respects clearly and admittedly entitled.

May we at this point call to the attention of the Court the fact that there is no disputed question of fact in this case. Final judgment in the Supreme Court of California went against appellants before any answer, demurrer, or other appearance had been filed on behalf of respondents (appellees here). No pleading of any kind has been filed

at any time by the said respondents or any of them. So, under the familiar rule, all of the allegations of fact in the petition for mandate in the State court must be taken as true, and we are satisfied that counsel for appellees will agree to that statement of the law, and to the statement of fact that the allegations of the petition for writ of mandate are true. (*Terrall* v. *Burke Const. Co.*, 257 U. S. 529, 66 L. Ed. 352.)

The Facts.

Appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., were, in October, 1933, and until dismissed, as hereinafter related, students in good standing at the University of California at Los Angeles. The main seat of the University of California always has been, and now is, at Berkeley, California. Some years ago a branch of the University was established at Los Angeles. Later this "branch" became the "University of California at Los Angeles." Appellee Robert Gordon Sproul is president of the University of California. Appellee Ernest Carroll Moore is vice president of said University and provost of the University of California at Los Angeles. Both the student appellants are minors and they instituted this proceeding by their fathers and guardians *ad litem*, Albert Hamilton and W. Alonzo Reynolds. The two fathers also joined in the law suit as individuals, asserting their rights as citizens and taxpayers to demand the reinstatement of their sons as students.

Soon after the opening of the Fall Semester both boys petitioned the University authorities for exemption from military training upon the sole ground of their conscientious religious objections. Both boys being active members of the Methodist Episcopal Church, and both being sons and grandsons of Methodist ministers, they rested their claim

to exemption upon the official resolutions of the General Conference of the Methodist Episcopal Church held at Atlantic City, New Jersey, in 1932, and of the Southern California Conference at its sessions in 1931 and 1933. All of the said resolutions are set out in full in the petition for mandate (R. 3, 4).

The boys' petition for exemption from military training was denied. Thereafter, Bishop James C. Baker, of the San Francisco area of the Methodist Episcopal Church, and others, appeared before the Regents of the University at Berkeley and asked that courses in military training be made elective, and that Hamilton and Reynolds be exempted from the requirement of compulsory military training. On or about October 10, 1933, the Regents of the University by resolution refused to make military training optional, and refused to exempt appellants, Albert W. Hamilton and W. Alonzo Reynolds, Jr., from compulsory military training at the University. Thereupon Hamilton and Reynolds respectfully declined to participate in military drill and were upon the exclusive ground of that refusal suspended by the vice president and provost, appellee Dr. Moore.

The primary object of establishing units of the Reserve Officers Training Corps at the University of California is in fact and as officially announced in the University's publications, to qualify students for appointment in the Officers Reserve Corps of the United States Army. The courses in military training are those prescribed by the War Department for Infantry Units of the Senior Division of the Reserve Officers Training Corps. The Regents of the University of California require enrollment and participation in said courses of military training for at least two academic years of all able-bodied male students who are citizens of the United States. Said courses include instruction in rifle marksmanship, scouting and patrolling, drill and

command, musketry, combat principles and use of automatic rifles. Arms, equipment and uniforms for use of students in such courses are furnished by the War Department of the United States Government (R. 2, 3).

As members of the Methodist Episcopal Church, all of the petitioners (appellants here) have accepted and do accept and feel themselves morally, religiously and conscientiously bound by the tenets and discipline of said Church, as expressed in the resolutions quoted in the petition for writ of mandate from the General Conference and the Southern California Conference of said Church; each of appellants is a follower of the teachings of Jesus Christ; each of them accepts as a guide to his life the teachings of Jesus and of the Bible and holds as a part of his religious and conscientious belief that war and training for war and military training are immoral and wrong and contrary to the letter and spirit of the teachings of Jesus and the precepts of the Christian religion (R. 5).

The University of California as a state institution affords education such as, and upon such terms as, are not to be had at any other educational institution in California except at greater cost, which appellants Albert W. Hamilton and W. Alonzo Reynolds, Jr. are not able to pay (R. 6).

Appellants were at all times ready, able and willing to take as a substitute for military training such other courses as might be prescribed by the University, which fact was known to appellees before the date of the order of suspension above mentioned (R. 7). After the suspension appellants petitioned for a writ of mandate to compel their reinstatement as students upon State and Federal Constitutional points. Judgment went against them. Their appeal rests entirely upon the Federal questions hereinafter discussed.

Specification of Errors.

The assignment of errors is set out in detail at pages 31 to 35, inclusive, of the Record. That assignment of errors was adopted by appellants as their statement of the points to be relied upon in the argument in this Court (R. 39).

Summarized, the errors assigned are that the court below erred in holding:

1. That (a) the Organic Law of the University of California (Stats. 1868, P. 248, Sec. 6); (b) Article IX, Sec. 9, of the Constitution of the State of California, and (c) the regulations of the Regents of the University of California, as applied, do not violate the rights of appellants under the due process clause of the 14th Amendment;

2. That those statutes, as applied, do not abridge the privileges and immunities of appellants as citizens of the United States in violation of the 14th Amendment;

3. That the same statutes as applied are not contrary to the treaty of the United States known as he Kellogg Pact of 1928;

4. That in suspending appellants from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps, the Regents of the University have not violated appellants' rights under Article VI, Clause 2, of the Constitution of the United States, and under the 14th Amendment thereof.

And that the court below erred in failing to hold:

(1) That each of the above named statutes as applied so as to authorize the suspension of appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps violated their rights under the due process clause of the 14th Amendment;

(2) That each of the above named statutes as applied abridges the privileges and immunities of appellants as citizens of the United States in violation of the 14th Amendment;

(3) That each of the above named statutes as applied is contrary to the Treaty of the United States known as the Kellogg Pact of 1928;

(4) That in suspending appellants herein from the University solely because they refused, upon conscientious and religious grounds, to participate in military drill in the Reserve Officers Training Corps, the Regents of the University have violated appellants' rights under Article VI, Clause 2 of the Constitution and under the 14th Amendment thereof.

And, finally, that the court particularly erred in refusing to grant a writ of mandate requiring the Regents to reinstate petitioners and appellants herein as students of the University of California.

ARGUMENT.

It is respectfully submitted that this case is important in that it affords opportunity to this Court to declare anew, and to protect and enforce, the American tradition and constitutional guaranty of freedom of religion, and the privileges and immunities of citizens of the United States as guaranteed by the 14th Amendment against abridgement by the States. We propose to show that, just as this Court protected against state aggression the principle of freedom of speech in *Stromberg* v. *California,* 283 U. S. 359, 75 L. Ed. 1117, and the principle of freedom of the press in *Near* v. *Minn.,* 283 U. S. 697, 75 L. Ed. 1357, it must now be held that another of the great fundamental civil liberties guaranteed to Americans by the 1st Amendment also is protected against state aggression by the due

process clause of the 14th Amendment. We are constrained to regard *Stromberg* v. *California,* and *Near* v. *Minnesota,* as landmarks in the history of our civil liberties under the Constitution. And we think it is clear that all of those liberties enumerated in the 1st Amendment are equally entitled to the vindication and protection of this Court.

Two young men, American born citizens of the United States, both sons and grandsons of Methodist ministers, and both devoted members of the Methodist Episcopal Church, have been suspended from their State University upon the sole and exclusive ground of their respectful refusal to surrender their deepest convictions of religion and conscience and submit to enforced military training for war. No other ground for their suspension has been suggested. No other ground we are confident will be urged by counsel for the appellees. None of the allegations of fact of the petition for writ of mandate filed in the Supreme Court of California as a court of original jurisdiction has been denied or challenged in any way. No demurrer, answer, or other pleading was filed in the lower court. The petition for mandate was filed on Friday, December 8, 1933, and the final judgment on the merits denying petitioners any and all relief was filed on the first business day thereafter, namely, Monday, December 11, 1933.

The Honorable Supreme Court of California seems to have rendered judgment for the defendants as if pursuant to an order sustaining a general demurrer without leave to amend. But there was no demurrer. Nor was there any statement in writing of the reasons of the Court for its decision, as required by the Constitution of California. Articles VI, Section 2, provides that "in the determination of causes, all decisions of the court, in bank or in department, shall be given in writing, and the grounds of the decision shall be stated."

Later, and on January 8, 1934, the Court denied a petition for rehearing and rendered in that connection a brief opinion (which is reported in 87 Cal. Dec. 88, and printed in full at pages 29 and 30 of the Record herein). In that opinion the Supreme Court of California, on page 3, said:

> "We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States. (*Pearson* v. *Coale et al.*, 167 Atl. (Md.) 54; 54 Sup. Ct. Rep. 131 (*Coale* v. *Pearson et al.*))" (R. 30).

Upon reading that opinion counsel for appellants learned for the first time that the California court relied upon the Maryland case in arriving at its decision. The opinion being rendered in support of an order denying a petition for rehearing, there was no opportunity to counsel to distinguish before that court between the Maryland case and the case now before the court. The cases are sharply distinguishable. This Court in November, 1933, dismissed the appeal of the student Coale from the decision of the Maryland Court of Appeals upon the ground that the appeal did not present a substantial Federal question. Our case rests squarely upon the Constitution and laws of the United States and presents, in the language of Mr. Justice Sutherland in his memorandum appended to his order allowing our appeal, a "novel and important" question on the merits. We shall undertake a little later to show that more than one novel and important Federal question is presented by our appeal.

In another particular our case is to be sharply distinguished from *Coale* v. *Pearson*. In that case counsel for the appellees, the University of Maryland and its president and regents, in their brief in opposition to the motion to dismiss the appeal, stated in substance that the only ques-

tion of importance presented by the appeal was as to the correctness or incorrectness of the Maryland Court's construction of the Maryland statute requiring compulsory military training. And of course this Court has held many times that it is bound by the construction of State statutes by the highest court of the State.

Also, in the Maryland case, counsel for appellants specifically stated in their brief in opposition to the motion to dismiss that they had not and did not claim any abridgment of the privileges and immunities of their student clients as citizens of the United States. On behalf of our appellants we do most earnestly contend that their suspension from their State University for their refusal to submit to enforced membership and service in the Reserve Officers' Training Corps, which is distinctly a branch of the Federal Military Establishment, and maintained for Federal purposes, constitutes an abridgment of their privileges and immunities as citizens of the United States in violation of the 14th Amendment.

The California Statutes.

As pointed out in the assignment of errors, and in our statement as to Jurisdiction, it is our contention that in this case in the California court the validity of three statutes of California was drawn into question and that the decision of the Supreme Court of California sustained the validity of each of those statutes. The court below in its opinion specifically sustains the validity of two of those statutes and inferentially sustains the third.

In paragraph (1) the court said:

> "The constitution of the State of California (Art. IX, Sec. 9) reposes in the Regents of the University of California, full powers of organization and government of the University, subject only to such legisla-

> tive control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds."

Our contention in the court below was and here is that that section of the California Constitution as applied to sustain the suspension of the student appellants herein violated their rights under the due process clause and the privileges and immunities' clause of the 14th Amendment, and under the Treaty of the United States known as the Kellogg Pact of 1928, and under Clause 2 of Article VI of the Constitution of the United States, which reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

We also contended, and here contend, that the Organic Act creating the University (Stats. 1868, p. 248,, Sec. 6), as applied to sustain the suspension of our student appellants for their refusal to participate in enforced military training violated their rights under the 14th Amendment.

And, third, we contended below and here contend that the rule or resolution of the Regents of the University requiring compulsory training, as here applied to sustain the suspension of appellants violates their rights under the 14th Amendment, the Kellogg Pact, and Clause 2 of Section VI of the Constitution. All those contentions upon Federal constitutional grounds the court below swept aside with the single sentence: "We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States".

Having in mind that it is this general rule of the Regents requiring compulsory military training that constitutes a statute, the validity of which is drawn into question, within the meaning of the cases in this Court, it seems clear that the validity of that statute as well as of the Statute of 1868 known as the Organic Act of the University, and Section 9 of Article IX of the California Constitution is drawn into question by this appeal.

It seems appropriate to consider together the Statute of 1868 and the constitutional section. In the court below we quoted the language of the Organic Act providing that every resident in the State of California of the age of 14 years or upwards shall have the right to attend the University. We realize that it may be held that that statute has been superseded by Section 9 of Article IX of the Constitution which reposes in the Regents of the University of California full powers of organization and government of the University, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. That language would seem clearly to take from the Legislature the power which it had been given under the Organic Act to manage and conduct the University. We do not rely upon that statute as supporting the right of our student appellants to attend the University. We do not argue at this point that the right to education in the State University is a right under the Constitution and Laws of the United States. Our contention is, and we shall argue a little later on, that the State of California, acting through the Regents of the University may not validly impose as a condition upon which the privilege of education will be accorded, the surrender of rights and privileges and immunities which belong to appellants as citizens of the United States by virtue of the Constitution and Laws of the United States.

We shall contend also that the suspension of the student appellants from the University for their refusal to surrender their deepest convictions of conscience and religion constitutes a deprivation of religious liberty as guaranteed by the 1st Amendment against abridgment by Congress, and as protected against restriction by the States by the due process clause of the 14th Amendment. And we shall contend further that compulsory military training in a State university is violative of the spirit, if not the letter, of the Treaty of the Unted States known as the Kellogg Pact of 1928.

Compulsory membership and service in the Reserve Officers Training Corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the 14th Amendment.

Stated most concisely, our contentions on this point are as follows:

(a) The Reserve Officers Training Corps is a branch of the Federal military service, maintained for Federal purposes.

(b) Without authorization by Act of Congress there is no power in the Federal Government (much less the State) to compel service in any branch of the Federal military establishment in time of peace.

(c) This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (14th Amendment.)

(e) If it is said that the privileges and immunities of appellants are not abridged because they are not actually be-

ing compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and

(f) No State may impose, as a condition upon which it will extend a privilege which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States.

Taking up the foregoing six propositions *seriatim:*

(a) The Reserve Officers Training Corps is an integral part of the military forces of the United States. It is set up by Act of Congress: U. S. C. A. Title 10 Army; Chapter 20, Reserve Forces; Section 381 Establishment of Reserve Officers Training Corps. The R. O. T. C., is no part of the military establishment of the State of California. It is not mentioned in the new Military Code of California, approved and published in June, 1933. The organization's membership, control, courses of study etc., are under the direction and control of the War Department. The commanding officers, the uniforms, the weapons are supplied by the Federal Government. And, as stated in the University's Bulletin for the information of students, the primary object of establishing units of the R. O. T. C. at the University is to qualify students for appointments in the Reserve Officers Corps of the United States Army (R. 2). That statement of fact is made, in the petition for mandate in the court below, and never has been disputed. Thus it is clear not only that the R. O. T. C. is distinctly Federal in its nature and set-up, but also that it exists for Federal purposes. If the R. O. T. C. were a part of the State military establishment, or if military training at the University were in the University Cadets, as it was prior to the establishment of the R. O. T. C. at the University of California, our case would be materially different. There

we would have the question of the right of the State to compel military training, and service in the University's military units, for state purposes, and not for a Federal purpose. It is not necessary for us here to contend that compulsory training in such a State military unit, for State purposes, would constitute an abridgment of the privileges and immunities of citizens of the United States.

On the other hand, our problem here is clearly Federal. It is as citizens of the United States, not as citizens or residents of California, that appellants are required to accept compulsory military training. The Regents of the University of California require enrollment and participation in the military training courses for at least two academic years *of all able-bodied male students who are citizens of the United States* (R. 2).

(b) Without authorization by act of Congress there is no power even in the Federal Government to compel service in any branch of the Federal military establishment in time of peace. Even in war time, specific acts of Congress are required to enable the conscription of men for military service. The selective service Act of the World War was passed to meet that need. It is true that every citizen is bound to render military service to his country when called upon to do so. (Act April 22, 1898, 30 U. S. Stat. at L. 361, c. 187, Sec. 1.) But, as said in 5 *Corpus Juris*, at page 297, citing *In re Riley*, 20 F. Cas. No. 11834; 1 Ben. 408, 39 How. Pr. (N. Y.) 188;

> "The army is recruited in times of peace, and, except when conscription becomes necessary, in times of war also, by voluntary enlistment. The enlistment of soldiers in the army of the United States, as an incident to the power to raise armies, is wholly within the regulation and control of Congress."

And of course it is common knowledge that all enlistments, in time of peace, in the Army and Naval Academies,

are voluntary. The R. O. T. C. is another Federal institution for the training of citizens to be officers in the Army.

Possibly, on the authority of *United States* v. *MacIntosh, supra,* this Court would hold that Congress has power to make military training compulsory in the R. O. T. C. and in the Army and Naval Academies. But Congress has not done so. The University of California is a Land Grant college, enjoying Federal subsidy under the Morrill Land Grant College Act approved July 2, 1862. Undoubtedly many such institutions have made military training compulsory in the sincere belief that the Morrill Act required that it be compulsory. It does not. It requires that

> "income from (proceeds of lands ceded by the Federal Government to the States) shall be inviolably appropriated to the endowment, support and maintenance of at least one College of Agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and mechanic arts".

In construing that requirement, it would be just as reasonable to hold that courses in agriculture, or in classical studies, or in mechanic arts, are required to be made compulsory, as that courses in military tactics are required by the Morrill Act to be made compulsory.

The situation reduces itself to the absurd when we suggest that all the subjects named above, and required to be taught, are intended to be compulsorily required. The very apparent purpose of Congress in enacting the statute is to assist education, in the states, of students seeking training in any of those sharply differing professions.

So far as we know, this Court has never passed upon the question we are now discussing. Twice, however, the Attorney General of the United States, in 1923 and in 1930,

has rendered his opinion to the Secretary of the Interior that there is no requirement in the Morrill Act that military training shall be compulsory in the Land Grant colleges (See 36 Opinions of Attorney General 297).

And, since Congress has not required that military training in that branch of the Federal military establishment known as the Reserve Officers Training Corps shall be compulsory, certainly the States and the Universities are without power to compel service in that military organization, not of the state but of the Federal Government.

(c) It would seem to require no argument to support our deductions from the foregoing points (a) and (b) that this freedom from compulsory service in a branch of the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States. Clearly it is not a privilege or immunity which appellants enjoy as citizens of California. California could not force men into the Federal military. Congress can and does, in time of war, but has not done so in time of peace. We are familiar with the cases holding that the privileges and immunities clause of the 14th Amendment protects only those privileges and immunities which citizens of the United States enjoy as such, as distinguished from others which accrue to citizens of the States as such. The immunity which we are here discussing has, and can have, no relationship to State citizenship. The State has nothing to do with raising, equipping, manning, training and supporting units of the Federal miltary establishment. The State could not grant immunity to its citizens for peace-time or war-time service in the Federal military forces.

That immunity exists by virtue of the fact that Congress, which alone has the power, has refrained from requiring enforced service.

The exclusiveness of the Federal government's control of all matters having to do with the Nation's military forces is strikingly manifested in the Selective Draft Cases (*Arver* v. *U. S.*, 62 L. Ed. 349, 354, 245 U. S. 363, 381) wherein it is said:

> "When the constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since, besides the delegation to Congress of authority to raise armies, the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Art. I, Sec. 10."

At P. 389 (245 U. S.) Mr. Chief Justice White says:

> "In reviewing the subject we have hitherto considered it as has been argued from the point of view of the Constitution as it stood prior to the adoption of the 14th Amd. But, to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past, *how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating, as it does upon all the powers conferred by the Constitution,* leaves no possible support for the contentions made, if their want or merit was otherwise not so clearly made manifest."

The privileges and immunities guaranteed against state abridgment by the 14th Amendment are those arising out of the essential nature and character of the National

Government, and granted or secured by the Constitution of the United States (*U. S.* v. *Cruikshank,* 92 U. S. 542).

Clearly the immunity from enforced service in a branch of the Federal military establishment in time of peace arises "out of the essential nature and character of the National Government", and is "secured by the Constitution of the United States", which proclaims as the Supreme law of the land the Constitution itself and the laws of the United States made in pursuance thereof (Art. VI, Clause 2). The Morrill Act, *supra,* is the specific law "made in pursuance thereof", and it affords the immunity from enforced service in time of peace by not making military training in the land grant colleges compulsory. Similarly the act establishing the R. O. T. C., cited above, refrains from making training compulsory and from authorizing it to be made compulsory in the land grant colleges and other state educational institutions. It does, however, authorize the requirement of compulsory military training in other institutions wherein R. O. T. C. units are established, thus bringing into relief the intention of Congress not to authorize compulsion in the State colleges.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States (14th Amendment). Even so enthusiastic an admirer of the Constitution as the present writer recognizes that the 14th Amendment requires no argument of his own to support it. So we add nothing to it.

(e) If it is said that the privileges and immunities of appellants are not abridged because they are not actually being compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and no state may impose, as a condition upon which it will extend a privilege

which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States.

We rest our argument on this point upon a line of decisions of this Court beginning with *Home Ins. Co. of N. Y.* v. *Morse,* 20 Wall. 445, 456, in which it was held that, although the power of a State is unquestioned to fix the terms upon which foreign corporations may do business within the State, the one condition which it may not impose is the surrender of the right under the Constitution and laws of the United States to transfer causes from the State to the Federal Courts upon the ground of diversity of citizenship. Without taking the time and space to quote from the opinion at length, we respectfully refer the court to that case. The facts were, briefly, these: A Wisconsin statute required foreign insurance corporations to sign an agreement that if sued in the State Courts they would not assert their right of transfer to the Federal Courts. The Home Ins. Co. signed such an agreement. Later it was sued in the Wisconsin Courts, and demanded that the case be transferred. The demand was rejected, and judgment went against the foreign corporation. On appeal to this Court, the judgment was reversed and the case sent back for transfer to the Federal Court and for trial there. The underlying principle involved of course was not the right of foreign corporations to have their cases transferred to the Federal Courts, but the supremacy of the Federal Constitution and laws in the field occupied by them, over the constitutions and laws of the States.

The permanency and finality of the ruling in the Wisconsin case is stressed by this Court in *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 66 L. Ed. 352. In a brief opinion Mr. Chief Justice Taft resolves a conflict in earlier

cases, and re-states the law establishing the supremacy of Federal Constitutional rights. We quote briefly—

> "The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. *It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts* in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the *sovereign power of a state* in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, must be considered as overruled, and that the views of the minority judges in those cases have become the law of this Court. The appellant in proposing to comply with the statute in question and revoke the license, was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is affirmed."

Now, applying the Constitutional principle expounded by Mr. Chief Justice Taft to the present case, we submit that, although the power of the Regents of the University of California to govern the University is unquestioned, including the power to fix the terms upon which students may be admitted, and prescribe the courses which must be taken, and to suspend students who decline to comply with the regulations, there is one condition which the Regents may not impose as a price for education, namely, the surrender of a right under the Constitution and laws of the United States belonging to our student appellants

as citizens of the United States. And we submit that *Terral* v. *Burke, supra,* sustains us in that contention.

Compulsory military training imposed upon religious and conscientious objectors violates religious freedom, and deprives appellants of their freedom of religion without due process of law.

Upon this point our task, as we see it, is to demonstrate that the principle of freedom of religion is legitimately and necessarily involved in this case. We contend that it is. If we are right in that, our way is clear from that point on. For just as freedom of speech as guaranteed by the 1st Amendment is protected against State abridgment by the due process clause of the 14th Amendment, as decided in *Stromberg* v. *California, supra;* and as freedom of the press is thus protected as decided in *Near* v. *Minnesota, supra,* so must freedom of religion, also guaranteed by the 1st Amendment, be protected from State aggression by the 14th Amendment. The principle is identical in all three instances.

Authoritative decisions of this Court on freedom of religion are not as numerous as we might hope, for the reason that all or practically all such decisions antedate *Stromberg* v. *California, supra,* and *Near* v. *Minnesota, supra.* The older cases held that the guaranties of civil liberties in the 1st Amendment afforded no protection against abridgment by the States, since the Amendment forbade only Congress to abridge those liberties. All that is changed by the *Stromberg* and *Near* decisions, which remove all doubt that the liberties guaranteed by the 1st Amendment, are a part of the liberty of which the 14th Amendment provides that no State shall deprive any person without due process of law.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1st Amendment.

We contend that depriving students of their right to education at their State University because of their refusal to engage in military training in violation of the religious teachings of their Church and their own deepest convictions of religion and conscience, amounts to a prohibition of the free exercise of religion, in violation of the 1st Amendment as more applicable to the States by the 14th Amendment. Certainly freedom of religion means something more than the right to worship according to the dictates of one's own conscience. No law or Constitutional guaranty is necessary to protect that right. The principle must afford protection to outward manifestations of religious belief. This Court has sustained such manifestations in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535, which cases we respectfully call to the Court's attention.

And in California we find one of the strongest cases in defense of religious freedom in *Hardwich* v. *Board of School Trustees,* 54 Cal. App. 696, holding that the suspension of children from a public school for their refusal, upon religious and conscientious grounds, to participate in training in dancing was a violation of religious freedom as guaranteed by the Federal and State Constitutions. The Supreme Court of California, in a brief opinion, affirmed the decision of the District Court of Appeal.

We respectfully submit that freedom of religion is necessarily involved, and that under the authority of the cases cited, that principle is entitled to protection against State aggression by the 14th Amendment.

Compulsory Military Training Violates the Kellogg Pact, Outlawing War.

The United States led more than 50 nations in the treaty by which they solemnly declared they would never resort to other than pacific means in the settlement of international differences. California, and the University of California, are bound by that treaty. The Federal Government, perhaps, may violate it. The States may not. We submit that compulsory training for war violates the spirit, if not the letter, of the Kellogg pact.

In conclusion, we submit that the judgment of the Supreme Court of California, denying relief to appellants, should be reversed, and that a writ of mandate should issue out of, or at the direction of this Court, requiring the reinstatement of Albert W. Hamilton and W. Alonzo Reynolds, Jr., as students at the University of California at Los Angeles.

Respectfully submitted,

JOHN BEARDSLEY,
Attorney for Appellants.

FILE COPY

OCT 29 1938

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 55

ALBERT W. HAMILTON, a Minor, by ALBERT HAMILTON, His Guardian ad Litem, et al.,

Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

REPLY BRIEF OF APPELLANTS.

John Beardsley,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 55

ALBERT W. HAMILTON, A MINOR, BY ALBERT HAMILTON, HIS GUARDIAN AD LITEM, ET AL.,

Appellants,

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

REPLY BRIEF OF APPELLANTS.

By permission of the Court appellants respectfully submit this brief statement in reply to the brief of Professor Sveinbjorn Johnson, of the University of Illinois, as *amicus curiæ*.

Professor Johnson states his thesis on page 2 of his brief as follows: "The appended brief is submitted in support of * * * the legal proposition that it was the intent and purpose of Congress, when the Land Grant Act of July 2, 1862, was enacted, that the beneficiary institutions main-

tain a reasonable number of compulsory courses of instruction in military tactics."

The professor does not, other than incidentally, attack the main argument of appellants that: (a) compulsory military training is a violation of the guaranty of religious freedom as expressed in the 1st Amendment, and as made applicable to State statutes by the due process clause of the 14th Amendment; (b) that a land grant college may not impose as a price for education the surrender of rights and privileges or immunities belonging to Appellants as citizens of the United States under the Constitution and laws of the United States.

If the Court should hold with Professor Johnson, our "privileges and immunities" argument would fall. Such a holding, however, would not affect our religious freedom argument.

Going directly to the kernel of the matter, we submit that the opinion of Attorney-General Mitchell, rendered to the Department of the Interior on June 20, 1930 (36 Opinions of Attorney-General 297), completely disposes of the argument that Congress intended that courses in military training at the land grant colleges should be compulsory. The Attorney-General states the question as "whether agricultural colleges having grants under the Act of July 2, 1862, c. 130, 12 Stat. 503, and amendatory Acts, are required to include military tactics among the compulsory courses of study or whether they may simply offer this subject as an elective course." He reviews the history of that statute and its amendments, and says: "The association of the words 'military tactics' in the statute with the words 'such branches of learning as are related to agriculture and the mechanic arts' shows that there was no intention to require instruction in military tactics to be compulsory upon the students any more than those branches of learning related

to agriculture and mechanic arts. If one branch is compulsory, all must be, and when we consider the great variety of branches which are related to agriculture and mechanic arts under the modern educational system, it is apparent that it would be impracticable to require any student to take all such courses. It is generally recognized that there is no obligation on agricultural colleges having land grants under the Act of July 2, 1862, to compel their students to take any course related to agriculture or mechanic arts."

Further on, the Attorney-General says: "I have also considered what was done after the passage of the Act of 1862. From a memorandum submitted to me it appears that in several of the States, at least, courses in military tactics were compulsory in the years immediately following the passage of the Act. But in a letter to the Secretary of War, under date of July 19, 1923, the Acting Secretary of the Interior informed the Secretary of War that—

> "'the policy of the Department of the Interior has been that a State fulfills its obligation under the law when it offers instruction and provides facilities for instruction in the branches of learning specified in the land-grant college legislation.'"

Mr. Mitchell then points out that "the problem has in particular been presented with respect to the State of Wisconsin since 1923, for in that year the legislature of that State provided by statute that the study of military training at the State University should be optional"; and "that in 1926 Congress, in amending the Act of July 2, 1862, reenacted the precise language of the Act of July 2, 1862" (language requiring that military tactics be taught); reenforcing that point with citations to cases in which this Court has held that the reenactment of a statute while an administrative interpretation of the statute is in effect—"amounts to an implied legislative recognition and approval of the executive construction of the statute."

Concluding, the Attorney-General says:

> "I am of the opinion that the construction of the statute adopted by your Department is a reasonable one, and that it was in effect approved by Congress by the reenactment of the language in question after the adoption and publication of that construction by your Department. Added force is given to the reenactment of this language by the fact that it occurred after the legislation in Wisconsin referred to above.
>
> "I, therefore, advise you that you are justified in considering that an agricultural college which offers a proper, substantial course in military tactics complies sufficiently with the requirements as to military tactics in the Act of July 2, 1862, and the other Acts above mentioned, even though the students at that institution are not compelled to take that course."

Professor Johnson, as *amicus curiæ,* devotes many pages of his brief to quotations from college administrators, private individuals, and unofficial organizations, all to the effect that those individuals held and expressed opinions differing from the opinion of Attorney-General Mitchell and from the practice of the Department of the Interior and the Department of War.

On page 24 of his brief, Professor Johnson says: "It (the War Department) has always taken the position that it was obligatory not only to require all able-bodied male students, not excused for cause, to pursue a course of study in military education and training, but that the requirements of the law in this behalf were not met by perfunctory or merely colorable compliance with the letter of the act. It was in response to a letter in which the position was taken by the War Department that training was compulsory that the Interior Department stated its policy." That language constitutes a rather clarifying admission by the Professor. Under the law, the Department of the Interior is the department to which is committed the responsibility

for dealings between the Federal Government and the land grant colleges. The Department of the Interior, presumably by advice of its solicitors, held that the colleges complied with the requirements of the statutes by affording courses and that there was no requirement that such courses be compulsory upon the students, and the Department of the Interior is the department which provides the certification of colleges which enables them to receive the financial support of the Government. Thus, on the administrative side, historically the appropriate department of the Government has taken and adhered to its very definite position.

It is true that in many instances, army officers have expressed the opinion that compulsory military training was required, but even that fact has little or no significance when we remind ourselves that on November 18, 1924, Secretary of War, John W. Weeks, wrote a letter to Walter C. Longstreth, of Philadelphia, a photostatic copy of which letter counsel for appellants exhibited in court in connection with his oral argument, and which letter is as follows:

"Mr. Walter C. Longstreth,
1218 Chestnut Street,
Philadelphia, Pa.

"DEAR SIR:

"Receipt is acknowledged of your letter of November 14, 1924, relative to the procedure necessary for an educational institution maintaining a unit of the Reserve Officers' Training Corps to change the status of its military training course from compulsory to elective.

"I am pleased to inform you that the National Defense Act does not make military training compulsory at any of the institutions which receive the benefits authorized by the Act.

"So far as the War Department is concerned it is optional with the authorities of the school, college or university whether military training shall be an elec-

tive or a compulsory course in the curriculum. However, a certain class of colleges, known as land-grant institutions must fulfill conditions specified in the Act of July 2, 1862, before they can receive the benefits granted by that act. The National Defense Act does not change or amend those conditions.

"I would suggest that you refer your query regarding the land-grant institutions to the Department of the Interior which is charged with the administration of the Act of July 2, 1862.

"For your information I am inclosing a copy of the form of application for the establishment of R. O. T. C. units.

"Your very truly,
(Signed) "JOHN W. WEEKS,
Secretary of War."

So we find upon examination that neither the Department of the Interior nor the Department of War has officially construed the requirement of military training as a requirement of compulsory training. Further than that, many of the land grant colleges themselves, including several of those represented by Professor Johnson in his brief, have manifested the perfectly clear understanding that the Federal statute does not require compulsory military training. For example, counsel for the Appellees, in his oral argument in this case, urged the point that students who were opposed to military training at the University of California might very easily escape it by taking the equivalent of freshman and sophomore years at one of the 37 junior colleges maintained by the State.

Mr. Johnson himself refutes his own historical argument fairly ably by pointing out that in 1879-80 the Ohio State legislature placed military training at Ohio State University, a land grant college (pp. 36-37) upon an optional basis; that Kansas State College in 1868 exempted certain students from military training (pp. 39-40); that in the charter of the Oklahoma Agricultural and Mechani-

cal College "the requirement to teach military tactics was not specifically mentioned" (p. 41); that certain exemptions were granted in 1889-90 at the Georgia State College of Agriculture (p. 39); that Pennsylvania State College in 1865 exempted students with conscientious scruples (p. 41).

There is no suggestion that any of those land grant colleges suffered a diminution of the support by the Federal Government because of their failure to make military training compulsory as to all students. And as pointed out in the oral argument, the State of Minnesota, within the last six or eight months has made military training optional and has suffered no reduction of its Federal support. Incidentally, the University of Minnesota is one of the land grant colleges on whose behalf Professor Johnson submitted his brief. Other colleges included in that group, including the University of Arizona, Rhode Island State College, the University of Maryland, Kansas State College, Michigan State College, and the University of Arkansas, we are advised have exempted conscientious objectors to military courses or at least indicated the possibility that such students might be exempted.

Finally, we respectfully submit that Professor Johnson has not only failed to establish his thesis that the land grant college Act requires that courses in military tactics shall be compulsory upon students, but that he has gone beyond the requirements of his employment by a number of colleges and has aided materially in establishing the sound proposition of law that the land grant college Act *does not* make any such requirement. Therefore, we urge our argument that since the Federal statutes do not require compulsory military training in the Reserve Officers' Training Corps, which is an integral part of the Federal military establishment, and since obviously no other power than Congress could conceivably require peace-time service in any branch of the Federal military establishment,

maintained for Federal purposes, that freedom from enforced service is a privilege and immunity of Appellants as citizens of the United States which would be abridged by their being compelled so to serve in time of peace, in violation of the privileges and immunities clause of the 14th Amendment.

And although Appellants are not now serving in the Reserve Officers' Training Corps and thus suffering that abridgement of their privileges and immunities as citizens, they having been suspended from the University for their refusal thus to serve, it is perfectly clear that no State may, by legislative enactment, by constitutional provision, or by a rule of the Regents, whether or not such a rule be termed a statute, impose as a price for the education which it may accord or withhold in its discretion, the surrender of rights or privileges or immunities accruing to Appellants as citizens of the United States by virtue of the Constitution and laws of the United States. In our opening brief and in our oral argument we have cited the appropriate authorities in the support of that proposition.

And may we remind the Court that we have made no attempt in this brief to renew our argument that it is a violation of the guaranty of freedom of religion to compel two devoted young followers of the teachings of Jesus to surrender their deepest convictions of religion and conscience, or, for their refusal, to deny them education at the hands of their State University to which they are in all other respects conclusively shown to be entitled.

Respectfully submitted,

JOHN BEARDSLEY,
Attorney for Appellants.

Washington, October 20, 1934.

FILE COPY

FILED
OCT 8
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his guardian ad litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

Appeal from the Supreme Court of California.

BRIEF FOR APPELLEES.

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In the Supreme Court
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ALBERT W. HAMILTON, a minor, by Albert Hamilton, his guardian ad litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

Appeal from the Supreme Court of California.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellees accept the statement of the case presented by the appellants except that they desire to add thereto the following facts:

Military training at the University of California has been compulsory ever since the date of the University's organization (1868), and at all times has

been conducted in conformity with provisions of the Statutes of the United States, and with financial and other aid from the United States.

See

Appendix A,

Chronological Outline of United States Statutes, relating to military training in land grant and other colleges.

Appendix B,

Chronological Outline of Constitutional and Statutory Provisions of the State of California, relating to the University of California and military training therein.

The University of California is a land grant college and constitutes a public trust of the State of California. It is administered by the appellee, the corporation known as "The Regents of the University of California,"[1] which has full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds.

Constitution of California, Art. IX, Sec. 9; Appendix B, p. xxiii.

---

1. The Regents of the University of California was incorporated under the General Laws of the State of California, June 18th, 1868, pursuant to the provisions of Section 11 of the Organic Act, Statutes of California, 1867-68, page 248. The corporation, The Regents of the University of California, has for its members twenty-four individual Regents. These Regents are not public officers.
Constitution of the State of California, Art. IX, Sec. 9;
Lundy v. Delmas, 104 Cal. 655.

Appellees desire also to comment on the following statement set forth in appellants' statement of facts. (Paragraph immediately preceding title, "The Facts.")

> (Appellees are unable to give exact reference as they have not received a printed copy though they have a typewritten copy of appellants' brief.)
>
> "Final judgment in the Supreme Court of California went against appellants before any answer, demurrer, or other appearance had been filed on behalf of respondents, (appellees here). No pleading of any kind has been filed at any time by the said respondents or any of them. So, under the familiar rule, all of the allegations of fact in the petition for mandate in the State Court must be taken as true, and we are satisfied that counsel for appellees will agree to that statement of the law, and to the statement of fact that the allegations of the petition for writ of mandate are true."

Appellees agree that for the sake of this appeal, under the circumstances, the allegations of fact in the petition for writ of mandate must be taken as true, and they do not assert that there is any intentional misstatement of fact in the allegations of this petition. However, had appellees filed a return in the Court below certain of appellants' allegations would have been denied, and certain affirmative allegations would have been made. This statement is made only by way of avoiding possible misunderstanding in this matter which might otherwise arise upon the oral argument.

INTRODUCTION TO ARGUMENT.

At the time this appeal was allowed this Court ordered that further consideration of the question of jurisdiction of the Court be postponed until the hearing of the case on the merits. Appellees, in respect to this question, contend that the Court has no jurisdiction of the appeal. Appellees further contend that appellants' case upon the merits is insufficient to warrant the relief asked, or any relief. The major question presented concerns the constitutionality of a standing order of The Regents of the University of California that its able-bodied male students shall enroll and take courses in military science and tactics in its Department of Military Science and Tactics, which courses are presently supplied by or in connection with a unit of the Reserve Officers' Training Corps located at the University of California. Appellants contend that, as applied to include appellants, this standing order is in violation of rights secured to them by the Constitution of the United States. In support of this position appellants advance the following points:

First: That while there is no express provision in the Constitution of the United States guaranteeing freedom of religion from encroachments by the states, nevertheless, the principle of religious freedom is so deeply embedded in our fundamental concepts of justice that any invasion of it must be considered contrary to the protective provisions of the Fourteenth Amendment; that appellants' religious and moral convictions forbid them to participate in the military instruction required, and

that the requirement of attendance violates the "due process clause" of the Fourteenth Amendment.

Second: Appellants concede (in so far as this point is concerned) that the State may compel its citizens to do military service in times of peace for the State's own purposes and in the State's own organizations, but assert that they may not be forced into any branch of the Federal military forces without appropriate congressional action. Otherwise, they say, there is an intrusion upon "privileges and immunities" assured by the Fourteenth Amendment. In this connection appellants assert that the Reserve Officers' Training Corps is a part of the military forces of the United States.

Third: Appellants further contend that compulsory military training, as required of male students of the University of California, violates the spirit, if not the letter, of the Kellogg Pact of 1928.

In answering the arguments of appellants, appellees will address themselves first to certain general considerations touching upon the question of jurisdiction, and then to the several contentions of the appellants which have been outlined above, discussing each separately and under a separate heading. The discussion of these several contentions will, however, necessarily embrace matters which appellees deem applicable alike to the question of jurisdiction and to the issues of the case upon its merits.

The following is a summary outline of the argument which appellees will present:

SUMMARY OUTLINE OF ARGUMENT.

I.

Appellees contend that this Court has no jurisdiction of the case presented by appellants and that the appeal should be dismissed for want of a substantial Federal question.

1. The requirement that appellants pursue courses in military training is not a statute, but is merely a disciplinary or scholastic regulation.

2. The state has a constitutional right in its discretion to prescribe curricula and provide for the internal regulation of its schools.

3. The appellants, as citizens of the United States, have no privilege to attend the University of California.

4. Appellants have suffered no invasion of any right of religious freedom. They are merely forbidden to continue as students unless they comply with the University's requirements.

II.

The requirement of military training does not violate the "due process clause" of the Fourteenth Amendment.

1. Religious freedom is not protected by the Fourteenth Amendment.

2. Assuming that religious freedom is to be included among the "liberties" protected by the

Fourteenth Amendment, it does not follow that state legislation, which may only incidentally intrude upon it, is therefore unconstitutional.

3. There is no intrusion involved in a state's requirement of military training. But, if there were, it would be purely incidental to a proper exercise by the state of its inherent right to protect itself and to assure the security of its citizens.

III.

Appellees' application of the regulation requiring military training is fully sustained by congressional authority, and abridges no privilege or immunity of a citizen of the United States. Congressional authority, however, is not requisite to appellees' enforcement of this requirement because the Reserve Officers' Training Corps is not a part of the military forces of the United States. This is indicated by:

1. An historical review of the development of the Reserve Officers' Training Corps;

2. An examination of the National Defense Act;

3. A study of the Morrill Act in connection with statutes establishing the Reserve Officers' Training Corps.

IV.

Compulsory military training, as required at the University of California, violates neither the letter nor the spirit of the General Pact for the renunciation of war (Kellogg Pact).

1. The pact does not outlaw defensive war;

2. The pact automatically releases all other contracting parties in relation to any party which violates the pact, and leaves them free to wage war on the treaty-breaking state.

ARGUMENT.

I.

APPELLEES CONTEND THAT THIS COURT HAS NO JURISDICTION OF THE CASE PRESENTED BY APPELLANTS AND THAT THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

1. Appellees concede that the requirement that able-bodied male students of the University of California shall pursue courses of military instruction in the Department of Military Science and Tactics at the University of California, into which is incorporated a unit of the Reserve Officers' Training Corps (Act of June 3rd, 1916, 39 Statutes, 191, Sec. 40, as amended June 4th, 1920, 41 Statutes, 776, Sec. 33; Army Regulations 145-10, Sec. 13), is a regulation adopted pursuant to the authority conferred upon the appellee, The Regents of the University of California, by the Constitution of the State of California. It is said that this regulation has the force of law, but if this is true in any sense at all, it is only in the very limited sense that applies to every internal school regulation which affects the course of study or intra-school activity of the students. It does no more than prescribe a study. It is, therefore, merely a disciplinary or scholastic regulation, being but one of many incorporated in a

general plan for the government of a university in which appellants and other students have matriculated not by reason of any compulsion, but of their own choice. Appellees submit that it is not a statute within the meaning of Section 237(a) of the Judicial Code. (Act of February 13, 1925. 43 Statutes 937; U. S. C. Title 28, Section 344.)

King Manufacturing Co. v. City of Augusta, 277 U. S. 100, 72 L. ed. 801. See especially the dissenting opinion of Mr. Justice Brandeis, with whom Mr. Justice Holmes concurs, at p. 116 (L. ed. 811).

2. Appellants also argue that, as applied, (semble, through the Regents' military training requirements) the provisions of the Constitution of California relating to the University of California themselves run counter to the prohibitions of the Fourteenth Amendment of the Constitution of the United States. Appellees see no merit in this argument; moreover, if followed to its end it leads to a denial of a state's constitutional right to prescribe curricula and provide for the internal regulation of its own schools, a conclusion which finds support neither in reason nor in the authorities.

Waugh v. Board of Trustees, 237 U. S. 589, 596, 59 L. ed. 1131, 1136;

State of Indiana ex rel Clark v. Haworth, 122 Ind. 462, 7 L. R. A. 240, 242.

See also, a discussion of this question in note in 47 L. R. A. (N. S.) 200.

3. The appellants, if they may attend the University of California at all, may do so only because the

State of California extends to them that privilege. They have no privilege to attend which attaches by reason of the circumstance that they are citizens of the United States.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 395;

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97;

Privileges or Immunities Clause, Fourteenth Amendment, D. O. McGovney, 4 Iowa Law Bulletin, 219;

Ward v. Flood, 48 Cal. 36.

In upholding the constitutionality of a statute providing for separate schools for white and colored students, and supporting as proper the act of a school principal in excluding a colored pupil offering herself at a school for white children, the Court said, Mr. Chief Justice Wallace delivering the opinion:

> "It will indeed be readily conceded that the privilege accorded to the youth of the State, by the law of the State, of attending the public schools maintained at the expense of the State, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship; and it is perhaps hardly necessary to add that assuredly no person can be said to have been deprived of either life, liberty or property, because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put."

The rule set forth in the case of *Ward v. Flood,* supra, has been expressed in numerous other cases cited in 6 *American and English Encyclopedia of Law,* page 77, where the following statement appears:

> "(5) Right of Attendance at Public Schools.—The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and, therefore, so far as the 'privileges and immunities' clause of the Fourteenth Amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state."

See, also,

Cumming v. Richmond County Board of Education, 175 U. S. 528, 545, 44 L. ed. 262, 266.

It follows that the statutes which appellants have attempted to bring into question here do not "abridge the privileges or immunities of citizens of the United States," and this clause of the Fourteenth Amendment to the Constitution of the United States therefore has no application.

4. Assuming for the sake of argument [but denying] that the right of religious freedom extends as far as appellants would carry it, still the point which appellants urge, namely, that appellants have been deprived of a "liberty" guaranteed by the clause of the Fourteenth Amendment which provides, "nor shall any state deprive any person of life, liberty, or property, without due process of law," is unsound.

The rule relative to military training at the University of California, enforced through its Regents,

does not impose any restriction whatever upon appellants, but merely forbids their continuance as students unless they comply with the University's requirements. Unless appellants have a constitutional right to attend the University no "liberty" could be abridged. But no such right exists.

Waugh v. Board of Trustees, supra;

Heim v. McCall, 239 U. S. 175, 191, 60 L. ed. 206, 216;

Atkin v. Kansas, 191 U. S. 207, 222, 223, 48 L. ed. 148, 157, 158;

Stephenson v. Binford, 287 U. S. 251, 275, 276, 77 L. ed. 288, 300, 301.

II.

THE REQUIREMENT OF MILITARY TRAINING AT THE UNIVERSITY OF CALIFORNIA DOES NOT VIOLATE THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT.

Briefly stated appellants' first point is this—Although the First Amendment to the United States Constitution respecting the matter of religious freedom applies only as a limitation upon Congress (*Barron v. Baltimore,* 7 Peters, 243), an act which will violate that Amendment if passed by Congress will, if passed by a state, violate the due process clause of the Fourteenth Amendment. In other words, the exact limitation which is imposed upon Congress by the First Amendment, is imposed by the due process clause of the Fourteenth Amendment upon the legislatures of the several states.

1. It has been decided that the "liberty" protected by the due process clause includes the rights of free speech and press;

Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117;

Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357,

and there is some logic in an argument which carries the principle of these cases over into the matter of religious freedom.

On the other hand the propriety of this extension is by no means free from doubt. Religion would seem to be a subject which, of all others, ought to be purely the concern of the state and its own people. Difference in the racial problems of the several states alone would seem to justify this view. That it would be logical to extend the protective qualities of the Fourteenth Amendment is not enough—some sound reasons such as quite clearly underlay the decisions relating to freedom of speech and press must be found, or the principle of Federal non-interference should be maintained. To illustrate, it would seem to be logical to say that since the free speech which is guaranteed under the First Amendment against Federal restriction is guaranteed under the Fourteenth Amendment against state limitation, the right to keep and bear arms which is guaranteed by the Second Amendment is likewise a liberty not to be infringed by the states. The logic is, however, merely apparent, and will not stand the test of practical application. In 1886 this Court, without dissent, held that a contention that a statute of Illinois which forbade citizens to bear arms unless as a unit of the organized Militia deprived one

accused of violation of the statute, of "either life, liberty, or property without due process of law, is so clearly untenable as to require no discussion."

Presser v. Illinois, 116 U. S. 252, 268, 29 L. ed. 615, 620.

2. Assuming, however, for the sake of argument only, the validity of appellants' contention presently under review, still the freedom is not so absolute as to bar legislation which may incidentally intrude upon it. While this assertion of principle applies also in some degree to freedom of speech and press (*Gilbert v. Minnesota,* 254 U. S. 325, 65 L. ed. 287), it must, in practical application, have a much broader significance in the treatment of problems arising in respect of freedom of religion. The inherent characteristics of the "liberties,"—speech and press on the one hand, and religion on the other,—are so very different as to make it clear that no such definite rules restricting the scope of legislation as may be laid down in the former category can be laid down in the latter. Speaking and publishing are acts capable of exact definition —a man speaks or he does not; he publishes or refrains therefrom. The conceptions of religion, *per contra,* are so various and ever-changing as to be incapable of classification or anticipation, much less definition, and its practices are as diverse as its conceptions. It is difficult, indeed, to suppose a statute regulating human conduct in any manner whatsoever which will not interfere with some religious belief, or the exercise thereof. Obviously, therefore, in the examination of any statute to determine whether or not it violates constitutional inhibitions upon the invasion

of religious freedom, consideration must be given both to the extent of the intrusion asserted and to the substance of the religious conviction claimed invaded, and the primary purpose and justification for the enactment must be balanced against these, to the end that a reasonable conclusion may be reached.

The Courts must ever be careful to avoid assuming, by indirection, the roll of legislators upon a matter deemed necessary of regulation by the legislative branch, by declaring invalid, because of incidental intrusion upon religious liberty, statutes having major importance in relation to other human or governmental activities. The Courts have no concern with considerations of public policy.

See:

Atkin v. United States, supra, (U. S.) 222, 223, (L. ed.) 158;

Waugh v. Board of Trustees, supra, (U. S.) 596, 597, (L. ed.) 1137.

3. In the instant case the statutes under attack have for their primary purpose the requirement of certain fundamental training designed to make the student more efficient in case of emergency. This requirement has been imposed without any reference to religion; it neither compels nor forbids the entertainment or exercise of any belief; it makes no discrimination upon religious grounds; it merely requires that as a condition to attendance at the University (attendance is neither compulsory nor a matter of right) students shall pursue a prescribed course in military training. Incidentally this requirement may trench upon the

religious convictions of appellants, who are members of a sect which, appellants allege, opposes war, training for war, and military training. This is enough, they declare, to render the requirement under discussion violative of the protection afforded by the due process clause of the Fourteenth Amendment of the Constitution of the United States. This is tantamount to a declaration that it would similarly violate the First Amendment were the question one of federal rather than state legislation.

Although the necessity of engaging in military training may be inconsistent with the religious convictions of some sect, this Court has heretofore decided, where it was urged that the right of Congress to exact enforced military duty by the citizens is repugnant to a free government and in conflict with the great guarantees of the Constitution as to individual liberty, that "the premise * * * is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion."

Arver v. United States, 245 U. S. 366, 378; 62 L. ed. 349, 353.

Thus the question has received consideration from the point of view of the right of Congress to compel military service, and it has been decided that such right is not subject to, nor limited by, the religious scruples of those who are called to service. If this is true with respect to congressional authority it is equally true with respect to the authority of states. The underlying principle in both cases is the paramount necessity that a government shall have the

power to protect itself and to defend all of the liberties of all of its citizens even though when so doing it may incidentally intrude upon some of the liberties of some of its citizens.

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."
>
> *Arver v. United States,* supra, (U. S.) 378, (L. ed.) 353.

As a matter of history, the power of conscription has been exercised by the Federal Government only in time of war, though the states at one time or another have required military duty or training of all members of the militia (which is synonymous in this sense with male citizenry of suitable age). (18 *Ruling Case Law,* 1055.) The principles expounded in the case of *Arver v. United States,* supra, will, however, apply with equal aptness to the maintenance and training of an army in time of peace. Certainly the state may not only provide itself with soldiers in time of war, but may determine that it is expedient in time of peace that instruction in the business of war be given those who must serve in its army if war breaks out, and so may enact measures appropriate to that end. In the absence of a plainly arbitrary abuse of this right, a statutory requirement that all young men of the state take some military training, would not appear to be open to attack upon any constitutional ground. Much less may reasonable exception be taken

to statutes or regulations which, in their application, demand of those young men who seek to avail themselves of the first two years of instruction at a state university no more than attendance at drill and military study, and do not impose an obligation of any sort to take up arms in active military service.

History shows us that no matter how firmly we have from time to time resolved that there shall be no more wars, wars have come upon us, and experiences of recent years have shown us at once how cruel and dangerous it is to enter upon a war relying for the protection of the country upon the hasty conscription of untrained men.

It may be added to what has been said, that unfortunately armed forces are needed not only for wars with foreign enemies but sometimes for the preservation of domestic peace. This has been the experience of our own country and of almost every other great nation. Accordingly, it can not be argued, consistently either with our constitutional declarations and delegations of power, or with principles of common sense, that the United States, as such, or the states in severalty, can not compel military service. Indeed, appellants concede this principle, but urge that it is to be modified by the qualification that military service is not to be required of one who is religiously opposed to war or military training. Carried to its logical conclusion, this would result in a nullification of the constitutional powers of government, as clearly pointed out in *Arver v. United States,* supra.

The general considerations hereinabove advanced have been fully discussed and supported in a number of recent cases.

U. S. v. Schwimmer, 279 U. S. 644, 73 L. ed. 889;

U. S. v. McIntosh, 283 U. S. 605, 75 L. ed. 1302.

The precise point urged by appellants has been decided adversely to them, by the Supreme Court of Maryland.

Pearson v. Coale, 167 A. (Md.) 54.

An appeal to the United States Supreme Court in this case was dismissed for want of a substantial Federal question.

Coale v. Pearson, 290 U. S. 597, 78 L. ed. 221.

III.

APPELLEES' APPLICATION OF THE REGULATION REQUIRING MILITARY TRAINING IS FULLY SUSTAINED BY CONGRESSIONAL AUTHORITY, AND ABRIDGES NO PRIVILEGE OR IMMUNITY OF A CITIZEN OF THE UNITED STATES. CONGRESSIONAL AUTHORITY, HOWEVER, IS NOT REQUISITE TO APPELLEES' ENFORCEMENT OF THIS REQUIREMENT, BECAUSE THE RESERVE OFFICERS' TRAINING CORPS IS NOT A PART OF THE MILITARY FORCES OF THE UNITED STATES.

Appellants' second point is briefly a contention that the Reserve Officers' Training Corps, of which a unit exists at the University of California, is a part of the military forces of the United States, and while apparently they concede that the state may compel its citizens to do military service in times of peace for the

state's own purposes and in the state's own organizations, nevertheless they say the state may not force any citizen of the United States into the Federal military service without appropriate congressional action. To do so, they urge, is in violation of the "privileges and immunities" clause of the Fourteenth Amendment. Impliedly they assert that with respect to training in the Reserve Officers' Training Corps no appropriate congressional action has been taken.

1. As will appear from the appended summary of Federal Statutes (Appendix A), the present Reserve Officers' Training Corps is but the culmination of a plan for the establishment of military training in land grant colleges, which had its inception in 1862 and was gradually enlarged and extended until 1916, when all the several provisions which had been made from time to time were gathered into one comprehensive enactment establishing a coordinated plan. Briefly the history of this matter is as follows:

On July 2nd, 1862, President Lincoln approved an act entitled "An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanic Arts," commonly known as the "Morrill Act." [12 Stat. 503; Appendix A, page i.] This Act provided the source of funds for the support of the colleges which were expected to be created, provided that the income of these funds should be inviolably appropriated to the endowment, support, and maintenance of at least one college where the leading object should be, without excluding other scientific and classical

studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. Further reference to this statute will be made later. In subsequent years from time to time the financial assistance thus provided was enlarged. By later statutes provision was made for the detail of officers of the regular army to act as instructors in military training in the land grant colleges, and the Secretary of War was authorized to issue such surplus articles of ordnance as might appear to him to be necessary for military instruction and practice.

In June, 1916, Congress enacted the National Defense Act (39 Statutes 166). In this Act all provisions relative to the National Defense were assembled, and as a part of the Act certain sections were adopted creating the Reserve Officers' Training Corps. By these sections the President was given authority to establish and maintain units of this corps in civil educational institutions, including the land grant colleges. Provision was made for the supply of equipment and uniforms, and the detailing of the necessary instructors. The Secretary of War was authorized to prescribe standard courses of theoretical and practical military training for the units. It was provided that no unit should be organized in a college or university unless the authorities should include in their curriculum the prescribed courses of military training, and agree to devote at least an average of three hours per week per academic year thereto. The University requires military training for only two years; to qualify for a commission in the Officers' Reserve

Corps it is, however, necessary to complete satisfactorily a four year course, the last two years of which may be undertaken by the student at his option, provided he shall have been selected for such additional training by the president of the institution and the professor of military science and tactics, and provided, further, that he shall complete satisfactorily an additional period of training at a Reserve Officers' Training Camp.

There is nothing in the Act which requires a member of the Reserve Officers' Training Corps to render military service to the United States, either in peace or in war, or to perform any military duty whatsoever save and except the requirements of study and drill. No oath of enlistment or allegiance is required. No definite period of enrollment is fixed, and continuance in the corps depends upon continuance as a student at the University.

(See Appendix A, page xiii et seq.)

Furthermore, "the control of the operation of the Reserve Officers' Training Corps units at institutions is vested in the institutional authorities. Civilian heads of institutions exercise the same general control over the Department of Military Science and Tactics that they ordinarily exercise over other departments of the institution."

Army Regulations No. 145-10, Sec. 13, War Department, Washington, May 31st, 1931.

Appellees submit that it is apparent from the history of the Reserve Officers' Training Corps that it is not a part of the military forces of the United States,

but, on the contrary, is merely a facility designed for the assistance of the several colleges which accept the benefits offered by the Federal Government.

2. Not only does the history of the Reserve Officers' Training Corps show that it is not a part of the military forces of the United States, but the fact is definitely indicated by the provisions of the National Defense Act (41 Stat. 759, 48 Stat. 153, Sec. 1; U. S. C. A., Title 10, Sec. 2), and by cases presently to be cited. The pertinent section of the Act here referred to reads as follows:

> "The Army of the United States shall consist of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the organized Reserves and the enlisted Reserve Corps."

Since it could not be contended that the Reserve Officers' Training Corps is any part of the naval or marine forces of the United States, the fact that it is not named as a constituent part of the Army of the United States would seem to establish beyond question that it is no part of any of the armed forces of the United States. With reference to the parts of the Army of the United States mentioned in the statute last cited it should, perhaps, be pointed out that the Officers' Reserve Corps is separate and distinct from the Reserve Officers' Training Corps, and that the two are not to be confused. The Officers' Reserve Corps is composed of officers holding reserve commissions and who are under oath to serve at the call of the President, whereas members of the Reserve Officers' Train-

ing Corps hold no commissions, are under no oath and are not subject to any call. The Reserve Officers' Training Corps has been organized and exists only for the purpose of limited training, as distinguished from each of the parts of the Army of the United States which have for their primary purpose to serve the nation as military forces.

As a final stand, appellants may argue that although the Reserve Officers' Training Corps is not named as one of the component parts of the Army of the United States, it should, nevertheless, be so regarded because the courses of instruction which it provides are prescribed by the Secretary of War, the uniforms and equipment devoted to its use are supplied by the War Department, and the instruction is given by officers of the Army detailed for that purpose.

A complete answer to this argument is to be found in cases having to do with the status of the National Guard. The Militia (National Guard) is subject to call to execute the laws of the Union, suppress insurrections and repel invasions; it is organized, armed, and disciplined, as Congress may direct; all that is expressly reserved to the states, respectively, is the appointment of officers, and the authority of training the Militia according to the discipline prescribed by the Congress of the United States.

> Constitution of the United States, Art. I, Sec. 8, Clauses 15 and 16.

All arms, uniforms, and equipment are supplied to the National Guard by the Federal Government, which also pays the officers and men for weekly drills and an annual fifteen day encampment, and provides the

transportation, rations, ammunition, and other supplies required in connection with the latter. Beyond this it builds or otherwise secures for the National Guard housing facilities in camp areas, constructs target ranges, installs water and sewer systems, etc. The President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each state; the organization (subject to minor exceptions) is the same as that of the Regular Army; the President, in time of peace or war, may assign the National Guard of the several states to larger tactical units. Finally, the discipline (which includes training) of the National Guard must conform to the system which is or may be prescribed for the Regular Army, and the training must be carried out by the several states as provided in the National Defense Act. Instructors are detailed from among the officers and non-commissioned officers of the Regular Army.

(39 Stat. 166; 41 Stat. 759; 42 Stat. 625; U. S. C. A. Title 32.)

From the outline given above it is clear that the National Guard may much more reasonably be claimed to be a part of the military forces of the United States than may the Reserve Officers' Training Corps, yet in all cases in which the question has been raised it has been held that unless "called" or "drafted" by the President to undertake active military operations, the National Guard is not a part of the Federal military forces.

Bianco v. Austin, 204 App. Div. 34, 197 N. Y. S. 328;

State v. Johnson, 186 Wis. 1, 202 N. W. 191;

Baker v. State, 200 N. C. 232, 156 S. E. 917;
Alabama and Great Southern Ry. v. U. S., 49 Ct. Cl. 522;
Oregon Ry. and Nav. Co. v. U. S., 60 Ct. Cl. 458;
Ann. Cas. 1917 B, note, p. 250, 251-252;
40 *Cor. Jur.* 669, §17.

3. Following the enactment of the Morrill Act many land grant colleges were established to accept the benefits offered by the Federal Government. In all of these, courses of military instruction were organized as required by the specific provisions of the Act. The construction then given to the clause relating to military training by common consent, and, we believe, without a dissenting voice, was that military instruction must be compulsory for students of the several land grant colleges. In no institution, so far as is revealed by available records, was military training made an elective study until in 1923 the legislature of the State of Wisconsin provided by statute that at the University of Wisconsin it should be optional for students to take military training or to pursue their studies without that course. The Department of the Interior ruled that such action as that taken by the University of Wisconsin, so long as a course of military training was offered, met the requirements of the Morrill Act. This view was concurred in by the Attorney General in an opinion written in 1923. (36 Opinions of Attorneys General 297.) To this opinion we shall briefly refer in a later paragraph.

Appellees believe that a proper interpretation of the Morrill Act is that compulsory military training is required to be a part of the curricula of the land grant colleges. The discussion of the Act in Congress at the time it was under consideration lends great force to this contention. Furthermore, it is a matter of history that, rarely, and in most cases never, were elective courses offered at the colleges and universities of the United States at the time the Morrill Act became law. Added to this the language of the Act itself strongly supports appellees' interpretation. For confirmation of the historical facts which we have noted, and a thorough discussion of the entire matter, including a careful review of available authorities, we refer the Court to an article, "Military Training in the Land Grant Colleges; is it Optional or Mandatory?" by Professor Sveinbjorn Johnson, formerly Attorney General and later Associate Justice of the Supreme Court of North Dakota, and presently Professor of Law, and Legal Counsel for the University of Illinois.

24 Illinois Law Review, 271.

We have referred to the opinion of the Attorney General of the United States holding in effect that a land grant college which offers a proper substantial course in military tactics complies sufficiently with the requirements of the Morrill Act even though the students at that institution are not compelled to take that course. The Attorney General feels that the use of the words, "leading object," indicates that Congress must have intended to repose some discretion in

the state or in the college to determine to what extent the subjects to be taught should be offered or required. What seems, however, to be the foundation upon which his decision was based is the following argument:

> "* * * It is significant that in 1926 Congress, in amending the Act of July 2, 1862, reenacted the precise language of the Act of July 2, 1862, italicized at the outset of this opinion. The Supreme Court has held in National Lead Co. v. United States, 252 U. S. 140, 146, 147, that the reenactment of a statute while an administrative interpretation of the statute is in effect 'amounts to an implied legislative recognition and approval of the executive construction of the statute * * *; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. United States v. Bailey, 9 Pet. 238, 256.' To the same effect are United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 339; United States v. Falk & Brother, 204 U. S. 143, 149.
>
> "I am of the opinion that the construction of the statute adopted by your Department is a reasonable one, and that it was in effect approved by Congress by the reenactment of the language in question after the adoption and publication of that construction by your Department. Added force is given to the reenactment of this language by the fact that it occurred after the legislation in Wisconsin referred to above."

We think the rule stated by the Attorney General is sound, but it overlooks two pertinent historical facts, namely, that *until 1923 the accepted interpretation of*

the Act of 1862 was that it made military training compulsory;

24 Ill. Law Rev. 271; and

Notes on Federal interpretation therein contained, and particularly pages 281, 289;

and second, that the *Morrill Act as enacted in 1862 was reenacted in 1883 after twenty-one years of general acceptance of the construction favoring a compulsory requirement.* The 1926 reenactment followed only about three years of administrative rulings permitting elective courses—made *contary* to the construction earlier approved by Congress.

Appellees earnestly contend that the construction was fixed by congressional interpretation in 1883, but assuming, while denying, that for a land grant college to offer elective courses in military training is consistent with its performance of its obligations under the Morrill Act, it by no means follows that it may not make these requirements compulsory. In fact, that it may do as it deems best in this regard is the *least* that the language of the Act can mean, because it says (Sec. 4) that the subjects agriculture and mechanic arts, without excluding other scientific and classical studies, and including military tactics, shall be required, and that these branches of learning shall be taught *"in such manner as the legislatures of the states may respectively prescribe."* (Italics ours.) Appellees' contention in this respect finds full support in the opinion of the Attorney General (supra). The clause quoted, he says, suggests that it was the pur-

pose of Congress to leave to the state a wide measure of control in the administration of the statute.

Appellants argue that the circumstance that the provision of the National Defense Act which authorizes the establishment of units of the Reserve Officers' Training Corps in land grant colleges is silent upon the question of whether military training shall be compulsory or elective, while the provision which relates to establishment in other institutions expressly specifies that it may be either, evidences congressional recognition that in the former class of colleges compulsory training could not be required. Appellees, on the contrary, find in this, confirmation of their belief that military training under the Morrill Act was to be compulsory. The National Defense Act establishing the Reserve Officers' Training Corps as noted above, was enacted in 1916 when the common construction of the Morrill Act was that it made military training compulsory. The Reserve Officers' Training Corps provisions accordingly should be read in the light of that construction. We submit that the least favorable interpretation which can be given to the Reserve Officers' Training Corps statute is that it impliedly, at least, confers authority upon all land grant colleges and universities which may become beneficiaries of the Federal Government pursuant to its provisions, to establish their several departments of military science and tactics on a compulsory basis if they so desire.

Finally, appellees direct attention to the circumstance that Section 4 of the Morrill Act, which requires that military training be taught in the land

grant colleges, was reenacted without any change, so far as pertinent to the points under consideration, in 1926, ten years after the Reserve Officers' Training Corps was established. Obviously it follows that Congress has authorized the use of this corps for the accomplishment of the training which *must* be given in the land grant colleges, whether compulsory, as appellees urge, or compulsory or optional "as the legislatures of the several states may prescribe," as seems to be the present view of the Federal departments, pursuant to the Attorney General's opinion, supra.

IV.

COMPULSORY MILITARY TRAINING, AS REQUIRED AT THE UNIVERSITY OF CALIFORNIA, VIOLATES NEITHER THE LETTER NOR THE SPIRIT OF THE GENERAL PACT FOR THE RENUNCIATION OF WAR.

Under the General Pact of Paris, signed August 27, 1928 (The Kellogg Pact, 46 U. S. Statutes at Large 2343), the parties thereto "condemn recourse to war for the solution of international controversies" and "renounce it as an instrument of national policy in their relations with one another." It is further agreed that the settlement of all disputes arising among them, of whatever nature or origin, shall never be sought "except by pacific means." The substance of the treaty is expressed in two short articles, as follows:

Article 1.

> The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of inter-

national controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

It is clear from the text that the General Pact does not purport to completely outlaw war or to make all preparations for war a violation of the Pact and hence illegal. Official interpretation of the text of the Pact as set forth in the exchange of notes which preceded signing, establishes conclusively that the treaty has a much more modest objective. (See "Notes Exchanged Between the United States and Other Powers on the Subject of a Multilateral Treaty for the Renunciation of War," Washington, Government Printing Office, 1928.) As authoritatively interpreted in these notes,

1. The Pact does not outlaw defensive war. In his note of June 23, 1928, Secretary Kellogg said: "There is nothing in the American draft of the anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty." (*Op. Cit.*, p. 33.) This was an official interpretation of the text later incorporated in the treaty, an interpretation noted and emphatically approved in the replies of other governments (see, for illustration, the reply of the French Government, *op. cit.*, p. 40; of the Italian Government, *op. cit.*, p. 42; of the Polish Government,

op. cit., p. 43; of the British Government, *op. cit.*, p. 45), and an interpretation considered essential if the text were to be made acceptable to our own and other governments.

2. The Pact automatically releases all other contracting parties in relation to any party which violates the Pact and leaves them free to wage war upon the treaty-breaking state. The preamble expressly declares that "any signatory power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits furnished by this treaty." And in Secretary Kellogg's note, quoted above, it was said: "there can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state." (*Op. cit.*, p. 34.) This interpretation was likewise noted and emphatically approved by other governments before the treaty was signed. (*Op. cit., passim.*)

The scope of the General Pact was limited still further by other interpretations and understandings which are set forth in the notes exchanged previous to the signing of the treaty; but it is unnecessary to refer here to these interpretations. Enough has been pointed out to make it abundantly clear that the General Pact leaves the High Contracting Parties entirely free to prepare for armed defense.

It should be noted, finally, that the General Pact deals only with war. International law recognizes other methods of armed defense which do not constitute war. (See Hyde, International Law, vol. II,

§§586-595; Moore, Digest of International Law, vol. VII, §§1089-1099.) Recourse to these methods remains unaffected by the Pact.

Clearly, therefore, it is no violation of the General Pact for the United States to prepare for armed defense, or for the state governments or any department thereof to contribute to such measures of preparation.

CONCLUSION.

Appellees respectfully submit:

That no substantial federal question is presented by the appeal in this case, and that it should be dismissed. If, however, this honorable Court shall decide that it has jurisdiction to determine the appeal upon its merits, then appellees submit that the decision of the Supreme Court of the State of California should be affirmed.

Dated, San Francisco, California,
October 5, 1934.

FREDERIC W. HALL,
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(Appendices A and B Follow.)

Appendix A

CHRONOLOGICAL OUTLINE OF UNITED STATES STATUTES RELATING TO MILITARY TRAINING IN LAND GRANT AND OTHER COLLEGES.

The following is a chronological outline of statutes enacted by the Congress of the United States relating to military training in land grant colleges. Acts or portions of acts which have direct and important bearing on the subject are given in full. The less important acts are either summarized, or noted by titles only.

I.

ACT OF JULY 2ND, 1862, 12 STATUTES, 503.
(Morrill Act.)

An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

Sec. 1. (Summary) Grants to the several states a quantity of land equal to thirty thousand acres for each senator and representative in Congress, exclusive of mineral lands.

Sec. 2. (Summary) The land aforesaid shall be apportioned in sections or subdivisions of sections, not less than one quarter of a section, where possible to be selected from such lands within the area of each state; where there is not the quantity of public lands necessary, land scrip shall be issued to the states to the amount in acres for the deficiency of distributive shares; said scrip to be sold by the states.

Sec. 3. (Summary) Expenses of management, superintendence, and taxes from date of selection of lands shall be paid by the states to which they belong, out of the treasury of said states, to make available entire proceeds of sale to the purposes hereinafter mentioned.

Sec. 4. (Full Text) And be it further enacted, That all moneys derived from the sale of lands aforesaid by the states to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the states, upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this Act,) and the interest of which shall be inviolably appropriated, by each state which may take and claim the benefit of this Act, to the endowment, support, and maintenance of at least one college *where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.* (Italics ours.)

Sec. 5. (Summary) The grants are made under the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts:

First. If any portion of the fund invested, as provided by Section 4 or any portion of the interest thereon shall be lost, it shall be replaced by the state to which it belongs; the annual interest shall be regularly applied in full to the purposes mentioned in the fourth section except that a sum not exceeding ten per cent upon the amount received may be expended for the purchase of lands for sites or experimental farms when authorized by the respective legislatures.

Second. No portion of said fund, nor interest, shall be applied to the purchase or maintenance of buildings.

Third. Any state which may take benefit of the Act shall provide, within five years, not less than one college, as described in Section 4, or the grant shall cease and the state shall repay or reconvey to the United States.

Fourth. An annual report shall be made regarding the progress of each college.

Fifth. Lands of a certain class shall be computed to the states at an increased price, which is fixed.

Sixth. No state in rebellion is entitled to the benefit of the Act.

Seventh. No state shall be entitled to the benefit of the Act unless it shall express its acceptance by its legislature within two years from date of approval of the Act by the President.

Sec. 6. (Summary) Scrip is not subject to location until after January 1st, 1863.

Sec. 7. (Summary) Provides for fees of land officers.

Sec. 8. (Summary) Governors of states to which scrip shall be issued must report sales annually to Congress.

II.

ACT OF APRIL 14TH, 1864, 13 STATUTES, 47. (Title only)

An Act extending the Time within which the States and Territories may accept the Grant of Lands made by the Act entitled "An Act donating public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July Second, eighteen hundred and sixty-two.

III.

ACT OF JULY 23RD, 1866, 14 STATUTES, 208. (Title only)

An Act to amend the fifth section of an Act entitled "An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July 2, 1862, so as to extend the Time within which the Provisions of said Act shall be accepted and such Colleges established.

IV.

ACT OF JULY 28TH, 1866, 14 STATUTES, 332-336.
(Revised Stat. 1225)

An Act to increase and fix the Military Peace Establishment of the United States.

Sec. 26. (only) And be it further enacted, That for the purpose of promoting knowledge of military science among the young men of the United States, the President may, upon the application of an established college or university within the United States, with sufficient capacity to educate at one time not less than one hundred and fifty male students, detail an officer of the army to act as president, superintendent, or professor of such college or university; that the number of officers so detailed shall not exceed twenty at any time, and shall be apportioned through the United States as nearly as practicable according to population, and shall be governed by general rules, to be prescribed from time to time by the President. Cf. XXV, XXVI (Sec. 40b) infra.

V.

ACT OF JUNE 8TH, 1868, 15 STATUTES, 67, 68.
(Title only)

An Act to further provide for giving Effect to the various Grants of public lands to the State of Nevada.

(Under Act of July 2nd, 1862.) See I supra.

VI.

ACT OF MAY 4TH, 1870, 16 STATUTES, 373. (Full Text)

Joint Resolution authorizing the Supply of Arms, for Instruction and Practice, to certain Colleges and Universities.

Be it resolved by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That the Secretary of War be authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of any small-arms or pieces of field artillery belonging to the government and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university, under the provisions of section twenty-six of the "Act to increase and fix the military peace establishment of the United States"; the Secretary to require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required. Cf. XXV, XXVI (Sec. 47) infra.

VII.

ACT OF MARCH 3RD, 1871, 16 STATUTES, 581.

(Summary) Enlarges rights of selection given under Act of June 8th, 1868. See V supra.

VIII.

ACT OF JANUARY 23RD, 1873, 17 STATUTES, 416.

(Summary) Extends time within which states may accept benefits of Act of July 2nd, 1862. See I supra.

IX.

ACT OF JULY 5TH, 1876, 19 STATUTES, 74.

(Summary) Increases the number of officers which may be detailed to land grant colleges from twenty to thirty. See IV supra.

X.

ACT OF MAY 4TH, 1880, 21 STATUTES, 110-113.

(Summary) Provides that upon application of any college, university, or institution of learning incorporated under the laws of any state within the United States, having capacity at the same time to educate not less than one hundred and fifty male students, the President may detail an officer of the Army on the retired list to act as president, superintendent, or professor thereof.

XI.

ACT OF MARCH 3RD, 1883, 22 STATUTES, 484.

(Summary) Enlarges the field of investments authorized by Section 4 of the Act of July 2nd, 1862. See I supra.

XII.

ACT OF MARCH 2ND, 1887, 24 STATUTES, 440.

(Title only)

An Act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an Act approved July second, eighteen hundred and sixty-two, and of the Acts supplementary thereto.

XIII.

ACT OF SEPTEMBER 26TH, 1888, 25 STATUTES, 491.

(Summary) Increases the number of officers of the Army which may be detailed to act as instructors to fifty. See IV supra.

Also authorizes the Secretary of War, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government and which can be spared for that purpose, such number as may appear to be required for military instruction and practice by students of colleges or universities given military instruction under Acts of Congress. See VI supra.

XIV.

ACT OF AUGUST 30TH, 1890, 26 STATUTES, 417.

(Summary) Makes additional appropriations to colleges established in accordance with an Act of Congress approved July 2nd, 1862. See I supra.

XV.

ACT OF JANUARY 13TH, 1891, 26 STATUTES, 716.

(Summary) Increases number of officers of Army which may be detailed as instructors to colleges to seventy-five, provided that no officer shall be detailed to any educational institution where instruction and drill in military tactics is not given. See IV supra.

XVI.

ACT OF NOVEMBER 3RD, 1893, 28 STATUTES, 7.

(Summary) Increases number of officers of Army who may be detailed as instructors, fixing term of duty. See IV supra.

XVII.

ACT OF AUGUST 6TH, 1894, 28 STATUTES, 233-235.

(Summary) Appropriation Act, with administrative instruction as to application of funds, specifically providing against cutting down detail of officers to colleges. See IV supra.

XVIII.

ACT OF MAY 17TH, 1900, 31 STATUTES, 179. (Title)

An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose.

(Contains protective clause insuring payment of funds for support of colleges under Act of July 2nd, 1862. See I supra.)

XIX.

ACT OF FEBRUARY 26TH, 1901, 31 STATUTES, 810.

(Summary) Provides for the detail of retired officers in addition to active officers authorized by Act of July 28th, 1866. See IV supra.

XX.

ACT OF JUNE 17TH, 1902, 32 STATUTES, 388. (Title)

An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

(Contains clause assuring that the United States will make up for any deficiency resulting from the

Act in the sum necessary for the support of colleges organized under the Act of July 2nd, 1862. See I supra.)

XXI.

ACT OF APRIL 21ST, 1904, 33 STATUTES, 225.

(Summary) Makes additional provision for detailing officers and non-commissioned officers (retired) as in the judgment of the President may be required to act as instructors of military drill and tactics in schools in the United States and Territories where such instructions are authorized by the educational authorities and where such services have been applied for by said authorities. Also contains provision for the issuance of ordnance. See IV, VI supra.

XXII.

ACT OF MARCH 4TH, 1907, 34 STATUTES, 1256, 1281.

(Summary) Provides additional funds for land grant colleges. See I supra.

XXIII.

ACT OF MARCH 3RD, 1909, 35 STATUTES, 732, 738.

(Summary) Last paragraph makes provision for improvement in pay conditions of retired officers detailed as instructors to military departments of land grant colleges.

XXIV.

ACT OF JULY 17TH, 1914, 38 STATUTES, 512.

(Summary) Permits the purchase under regulations to be established by the Secretary of War, by

educational institutions to which an officer of the Army is detailed as professor of military science and tactics, for cash, for use of military students, stores, supplies, material of war, and military publications. Cf. XXV, XXVI, infra.

XXV.

ACT OF JUNE 3RD, 1916, 39 STATUTES, 166, 191.

An Act for making further and more effectual provision for the national defense, and for other purposes.

(Summary) This Act is popularly known as the "National Defense Act of 1916." It designated the organizations which should make up the Army of the United States, and contained general provisions covering the Regular Army, National Guard, Officers' Reserve Corps, Citizens' Military Training Camps, and the Reserve Officers' Training Corps. The latter subject was covered by Sections 40 to 53, inclusive, all of which, except Section 46, have been substantially amended. See XXVI infra.

By Section 40 the President was authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps to consist of a senior division organized at universities and colleges requiring four years of collegiate study for a degree, including state universities and those state institutions "that are required to provide instruction in military tactics under the provisions of the Act of Congress of July second, eighteen hundred and sixty-two (see I supra), donating lands for the establishment of col-

leges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics."

Section 41 provided that no unit should be established until an officer of the Army should be detailed as Professor of Military Science and Tactics, nor until such institution should maintain, under military instruction, at least one hundred physically fit male students.

Section 43 authorized the Secretary of War to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and provided that no unit of the senior (university) division should be organized at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training, or to devote an average of at least three hours per week per academic year to such military training.

In the following sections additional provision was made for the detail of officers and non-commissioned officer instructors, for the issuance of arms, uniforms, and equipment; also for special benefits by way of commutation of subsistence to members of the Reserve Officers' Training Corps volunteering to take an advanced course of not less than two years duration.

XXVI.

ACT OF JUNE 4TH, 1920, 41 STATUTES, 759, 766.

An Act to amend an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice.

(Summary) This Act made certain amendments to the National Defense Act (see XXV supra), and included amendments to provisions relating to the Reserve Officers' Training Corps. The full text of these amendments constitutes the law as it stands presently, with one minor exception.

Sec. 33. That said Act be, and the same is hereby, amended by striking out sections 40, 41, 42, 43, 45, and 46, and inserting the following in lieu thereof:

"Sec. 40. Reserve Officers' Training Corps—Organization.—The President is hereby authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps, one or more units in number, which shall consist of a senior division organized at universities and colleges granting degrees, including State universities and those State institutions that are required to provide instruction in military tactics under the Act of Congress of July 2, 1862, donating lands for the establishment of colleges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics, and at those essentially military schools not conferring academic degrees, specially designated by the Secretary of War as qualified, and a junior division organized at all other public

and private educational institutions, and each division shall consist of units of the several arms, corps, or services in such number and such strength as the President may prescribe: Provided, That no such unit shall be established or maintained at any institution until an officer of the Regular Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students, except that in the case of units other than infantry, cavalry, or artillery, the minimum number shall be fifty: Provided further, That except at State institutions described in this section, no unit shall be established or maintained in an educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War.

"Sec. 40a. Reserve Officers' Training Corps Courses.—The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of such corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training, except as provided in section 47c of this Act.

"Sec. 40b. Personnel for Duty with Reserve Officers' Training Corps.—The President is hereby authorized to detail such numbers of officers, warrant officers, and enlisted men of the Regular Army, either active or retired, as may be necessary for duty as professors of military science and tactics, assistant professors of military science and tactics, and military instructors at educational institutions where one or more units of the Reserve Officers' Training Corps are maintained. In time of peace retired officers, retired warrant officers, or retired enlisted men shall not be detailed under the provisions of this section without their consent, and no officer on the active list shall be detailed for recruiting service or for duty at a school or college, not including schools of the service, where officers on the retired list can be secured who are competent for such duty. Hereafter retired officers below the grade of brigadier general and retired warrant officers and enlisted men shall, when on active duty, receive full pay and allowances."

Sec. 34. That said Act be, and the same is hereby, amended by striking out sections 47, 48, 49, 50, 51, 52, 53, and 54 and inserting the following in lieu thereof:

"Sec. 47. Supplies for Reserve Officers' Training Corps.—The Secretary of War, under such regulations as he may prescribe, is hereby authorized to issue to institutions at which one or more units of the Reserve Officers' Training Corps are maintained such public animals, transportation, arms, ammunition, supplies, tentage, equipment, and uniforms, belonging to the United States as he may deem necessary, and to forage at the expense of the United States public animals

so issued, to pay commutation in lieu of uniforms at a rate to be fixed annually by the Secretary of War, and to authorize such expenditures from proper Army appropriations as he may deem necessary for the efficient maintenance of the Reserve Officers' Training Corps. He shall require from each institution to which property of the United States is issued a bond in the value of the property issued for the care and safe-keeping thereof, except for uniforms, expendable articles, and supplies expended in operation, maintenance, and instruction, and for its return when required.

"Sec. 47a. Reserve Officers' Training Corps Camps.—The Secretary of War is authorized to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps * * * to transport members of such corps to and from such camps at the expense of the United States so far as appropriations will permit, to subsist them at the expense of the United States while traveling to and from such camps and while remaining therein so far as appropriations will permit, or in lieu of transporting them to and from such camps and subsisting them while en route, to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same, and to admission to military hospitals at such camps, and to furnish medical attendance and supplies; to use the troops of the

Regular Army, and such Government property as he may deem necessary, for the military training of the members of such corps while in attendance at such camps; and to prescribe regulations for the government of such camps.

"Sec. 47b. (Title only) Appointment of Graduates of Reserve Officers' Training Corps as Reserve Officers.

"Sec. 47c. Pay and Commutation of Subsistence, Reserve Officers' Training Corps. (Excerpt and summary) When any member of the senior division of the Reserve Officers' Training Corps has completed two academic years of service in that division, and has been selected for advanced training by the president of the institution and by the professor of military science and tactics, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, devoting five hours per week to the military training prescribed by the Secretary of War, and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished at the expense of the United States commutation of subsistence at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: * * *"

There follow provisions relating especially to Medical, Dental, or Veterinary training units.

XXVII.

ACT OF APRIL 13TH, 1926, 44 STATUTES, 247.

(Summary) This is a re-enactment of the Act of July 2nd, 1862 ("Morrill Act," see I supra) amending Section 4 thereof to enlarge the field open for the investment of funds, which concluded, as did the original Act, with the following language:

> "Provided, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section 5 of this Act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this Act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

XXVIII.

ACT OF MAY 12TH, 1928, 45 STATUTES, 501.

(Summary) Provides that nothing in the National Defense Act of 1916 (see XXV supra) shall be construed to require that advance training in the Reserve Officers' Training Corps follow without interruption upon the completion of the two years' basic, elective,

or compulsory course of military training prescribed for colleges in which units of the Reserve Officers' Training Corps are located.

Of necessity, there have been omitted from the foregoing Summary some sections which have bearing on the matter of military training in land grant and other colleges. It is believed, however, that nothing contributing substantially to an understanding of the development and general plan of the Federal contribution to military instruction in these colleges, or in anywise pertinent to the matters before the Court, has been omitted. It is believed also that the Summary contains citations to all relevant Acts.

Appendix B

CHRONOLOGICAL OUTLINE OF CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF CALIFORNIA RELATING TO THE UNIVERSITY OF CALIFORNIA AND MILITARY TRAINING THEREIN.

I.

STATUTES OF CALIFORNIA 1867-1868, page 248,
Approved March 23rd, 1868.

An Act to create and organize the University of California. (Commonly called "The Organic Act.")

(Summary) This act creates a state university to be known as the "University of California," provides for its government and management, and creates a Board of Regents charged with the general government and superintendence of the University. "The Regents * * * shall have power, and it shall be their duty, to enact laws for the government of the University, * * * and to determine the moral and educational qualification of applicants for admission * * *" (Sec. 13.)

Any resident of California of the age of fourteen years or upwards, of approved moral character, is given the right to enter himself in the University on such terms as The Regents may prescribe. (Sec. 3.)

Military training is made compulsory for all able-bodied male students by specific provision of the Act. (Sec. 6.) The language of this requirement is as follows:

"in order to fulfil the requirements of the said Act of Congress, (Act of July 2nd, 1862, "Morrill Act" 12 Stat. 503) all able bodied male students of the University, whether pursuing full or partial courses in any college, or as students at large, shall receive instruction and discipline in military tactics in such manner and to such extent as the Regents shall prescribe, * * *"

II.

STATUTES 1869-70, page 119, Approved March 4th, 1870.

An Act to provide military instruction in the University of California, and to authorize the Governor to call into service the retired officers of university cadets in cases of war or insurrection.

Section 1. (Full text) The students of the State University of California shall, as soon as practicable, be organized into a body, to be known as the "University Cadets," for the purpose of physical training and military drill and instruction.

Sec. 2. (Excerpt) The officers of said Cadets, * * * shall be appointed by the Faculty, on a competitive examination, * * * and they shall be commissioned by the Governor of the State.

Sec. 3. (Excerpt) The Adjutant-General of the State shall issue such arms, munitions and equipments * * * as the Board of Regents may require.

Sec. 4. (Excerpt) Upon graduating or retiring from the University, such officers may resign their commissions, or hold the same as retired officers of

the University Cadets, liable to be called into service by the Governor in case of war, invasion, insurrection or rebellion. * * *.

Sec. 5. (Excerpt) The Board of Regents shall make such further regulations as they shall deem proper and consistent with the Constitution and laws of this State.

Sec. 6. (Full text) It is not the intent of this law to lessen, encroach upon or retard the academic and scientific courses provided for in said University, but to secure a system of physical training, with habits of order and discipline, in aid of mental and moral advancement.

III.

An Act to establish a political code, approved March 12th, 1872.

(Summary) This Code provided in general for the political administration of the State of California, and included many sections relating to the University of California. (Sec. 1385, 1477 inclusive.)

Section 18 of the Code contained an express proviso that all statutes, laws and rules in force in the state prior to the adoption of the Code, whether consistent or not with the provisions of the Code, unless expressly continued in force by it, are repealed and abrogated.

(Note: Undoubtedly this had the effect of repealing the two statutes above noted; however, see IV infra.)

The sections of the Political Code relating to the University in effect included all of the provisions of the Act of March 23rd, 1868 (The Organic Act) and of the Act of March 4th, 1870 (University Cadet Act). (See I and II supra.) There were some minor departures, but substantially the provisions relative to admission, government, and military training remained unchanged. These sections have never been repealed specifically, though undoubtedly where in conflict with constitutional provisions (see IV and V infra) they are superseded. No legislation or constitutional enactment has altered or otherwise affected the provisions relating to the "University Cadets."

IV.

The Constitution of the State of California, 1879, ratified by a vote of the people May 7th, 1879.

This Constitution not only provided the outline of fundamental law such as is contained in the Constitution of the United States, but contained as well many detailed provisions relative to government, including sections regulatory of state institutions, education, and the like.

Article IX, Section 9 has specific reference to the University of California, and, as will be seen, reenacted the Organic Act of March 23rd, 1868 and amendatory acts, which had been repealed by the Political Code. (See III, also I and II supra.) The full text of this section as adopted in 1879 follows:

"Sec. 9. The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and the proper investment and security of its funds. It shall be entirely independent of all political or sectarian influence, and kept free therefrom in the appointment of its regents, and in the administration of its affairs; provided, that all the moneys derived from the sale of the public lands donated to this state by act of congress, approved July second, eighteen hundred and sixty-two (and the several acts amendatory thereof) shall be invested as provided by said acts of congress, and the interest of said moneys shall be inviolably appropriated to the endowment, support, and maintenance of at least one college of agriculture, where the *leading objects shall be (without excluding other scientific and classical studies, and including military tactics),* to teach such branches of learning as are related to scientific and practical agriculture and the mechanic arts, in accordance with the requirements and conditions of said acts of congress; and the legislature shall provide that if, through neglect, misappropriation, or any other contingency, any portion of the funds so set apart shall be diminished or lost, the state shall replace such portion so lost or misappropriated, so that the principal thereof shall remain forever undiminished. No person shall be debarred ad-

mission to any of the collegiate departments of the University on account of sex." (Italics ours.)

V.

The Constitution of California, Article IX, Section 9 (amended 1918).

This section was amended November 5th, 1918. The principal change made was in the first clause, which was altered to read as follows:

> "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds."

Otherwise the section is little altered. Reference to the Act of March 23rd, 1878 (The Organic Act) is omitted. Certain specific powers are conferred upon The Regents, in addition to the general power of government; the provision as to military training remains as in the original section.

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OCT 16 1934

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his Guardian ad Litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

PETITION, BRIEF AND ARGUMENT OF *AMICUS CURIAE*

SVEINBJORN JOHNSON

Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. . . . .

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his Guardian ad Litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

PETITION, BRIEF AND ARGUMENT OF *AMICUS CURIAE*

PETITION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The undersigned begs leave to file the attached brief in the above entitled cause on some legal propositions which may become of controlling importance in the cause.

Whether the Board of Regents of the University of California have the power to maintain as a compulsory condition, either of matriculation or of remaining in the University of California, that young men, not excused therefrom for good cause shown, enroll in and pursue a minimum num-

ber of prescribed courses in military tactics, may turn on the proper interpretation of the language of the Land Grant College Act of July 2, 1862, commonly known as the Morrill Land Grant Act, concerning instruction in military tactics. Land Grant Colleges, hereinafter named, all of which are vitally interested in this subject because all have always construed the Morrill Land Grant Act to require that actual study of military tactics by male students enrolled in these colleges was and is an obligatory condition of the enjoyment of the trust created by the United States Government, have asked the undersigned to file a brief on the interpretation of the clauses thereof relating to military training. The question is not academic, but arises every year, in one form or another, in many of the Land Grant Colleges, and has been brought into Court more than once, though not finally adjudicated by any State Court of last resort, and never by this Court.

The appended brief is submitted in support of this petition and of the legal proposition that it was the intent and purpose of Congress, when the Land Grant Act of July 2, 1862, was enacted, that the beneficiary institutions maintain a reasonable number of compulsory courses of instruction in military tactics. The Land Grant Colleges which have joined in the request to the author that this brief be filed are the following:

Purdue University
University of Arizona
Rhode Island State College
Texas A. & M. College
Montana State College
South Dakota State College
University of Maryland
University of Minnesota
Kansas State College
University of Florida
Connecticut State College
Michigan State College
University of Arkansas
University of Wyoming
Virginia Polytechnic Institute

Respectfully submitted,
SVEINBJORN JOHNSON,
Amicus Curiae.

BRIEF OF AMICUS CURIAE

Opinion Below

The opinion of the Supreme Court of California is reported in 87 Calif. Dec. 88.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by Acts of February 13, 1926, January 31, 1928, and April 26, 1928.

Question Presented

Whether under 12 Stat. 503, (Morrill Land-Grant Act of Congress), Act of July 2, 1862, and the Organic Act of the University of California, California Statutes, 1868, p. 248, Sections 3 and 6, and Regulations of the Board of Regents of the University of California, the appellants may be excluded from enrollment in and attendance at the University of California.

Statutes Involved

The statutes involved are printed in Respondent's Brief; the federal statute involved in the discussion in this brief is printed on page ... hereof, and is the Act of July 2, 1862, 12 Stat. 503, 504.

Summary of Argument

Under the war power Congress provides that in land-grant colleges, organized pursuant to 12 Stat. 503-505, U. S. Code, Title 7, C. 13, Sec. 304 (the Morrill Land Grant Act of July 2, 1862), it is obligatory upon the beneficiary institutions to require all male students enrolled therein, unless excused for good cause shown, to pursue a certain reasonable

minimum of courses in military tactics, and no constitutional right to be exempt from pursuing such courses exists either upon the ground of conscientious scruples, or otherwise.

Introductory Statement

It is not the purpose of *amicus curiae* to examine closely the position taken by the appellants and the grounds urged by them in support of the contention that the University of California, in excluding them from attendance at the University, acted in excess of its powers. That branch of the argument is the peculiar province of counsel for the University. The fundamental position taken by appellants seems to be that by action of the University of California their religious freedom has been infringed in contravention of the Fourteenth Amendment. This contention *amicus curiae* will not discuss in detail, though the fallacy of the position, as it appears to this writer, will be pointed out in a general statement.

The appellants seek to achieve in the guise of religious liberty that which Mr. Gilbert, in Gilbert v. State of Minnesota, 254 U. S. 326, unsuccessfully attempted to accomplish in the name of free speech—to undermine the efforts of the State to cooperate with the national government in the matter of the national defense. It is asserted that it is sought to compel the appellants to enter the service of the United States Government by requiring them to pursue courses in military tactics in the R. O. T. C. and that this amounts to an infringement of religious liberty, which, it is claimed, is protected under the Fourteenth Amendment, a denial of due process of law, and a violation of the provileges and immunities clause. It is said that the State has no power to compel citizens of the United States to enter any branch of the service of the United States; and it is asserted, as we understand it, that it is an infringement of the guaranty of re-

ligious liberty which, we are told, is protected against national and State action by the First and the Fourteenth Amendments, to force conscientious objectors, which the appellants claim to be, to pursue courses in military tactics in the University of California. It is pointed out that no state of war, or threat of war, exists and that the State of California is not requiring its young men to pursue courses in military tactics in order to defend itself or its citizens against actual or anticipated attack.

From these contentions it is deduced that the State University is without power to maintain the educational policy described, and to exclude appellants for non-conformity. As regards due process, involving in fundamental essence the question whether the action challenged is *reasonable*, appellants make no inquiry into the circumstances in order to determine whether, in their light, it may be said that the legislative body acted reasonably. When we think of the Civil War, the reverses in which inspired the military training clauses in the Morrill Act, and the conditions immediately following its close, it is difficult to take seriously the argument that the action of Congress and of California was not eminently reasonable.

It may be assumed, as this court did (although at that time it did not so decide), in Gitlow v. New York, 268 U. S. 652, at page 666, that the due process clause of the Fourteenth Amendment protects citizens of the United States against State action calculated to restrict the privilege of free speech; it appears also to the writer of this brief that it may be conceded, for the purpose of this argument, that the concept of religious liberty is likewise within the protection of the Fourteenth Amendment. This concession is not binding upon counsel for the University of California, and is probably of little importance in the case. Nevertheless,

amicus curiae, for the sake of the discussion to follow, concedes the point without further argument.

General Statement of Applicable Principles

The position of *amicus curiae* upon the merits of the whole case may be stated briefly under the following heads:

1. Under Article II, section 8, Congress has the power to declare war, to raise and support armies and to make rules for the government and regulation of the land and naval forces of the United States; it has the power to provide for calling forth the militia to execute the laws of the Union, and to suppress insurrections and repel invasions. In short, it has the power to provide for the training of officers and privates.

2. The writer assumes that it will not be seriously disputed by any responsible member of the bar that Congress, in enacting the Morrill Land Grant Act of 1862, when it made provisions therein for military training, had power to do so under Article II, section 8, supra, relating to the organizing of the army and provisions relating to national defense. In other words, the clauses in that act relating to military training in the Land Grant Colleges are undoubtedly supportable by reference to the war power. This subject, being obviously elementary, will not be pursued further.

3. Congress has power to authorize cooperative action by the States in connection with the recruiting of the army, the training of officers, and, in general, the making of adequate preparations for national defense. Although, of course, it may be conceded for the purpose of this discussion that with respect to war and the preparation for war, the power of Congress is exclusive, nevertheless that Congress may permit the States to exercise certain functions in this behalf,

will not be challenged. The National Defense Act of 1920 created a

> "definite military policy of the Nation . . . . The objective was the preparation of young men as reserve officers . . . . The military departments in the land-grant colleges became integral parts of the plans for national defense." U. S. Dept. of the Interior, Bull. 9, Vol. II, Pt. IV, p. 300, 301.

4. Congress, in the Morrill Act, for a valuable consideration, granted certain powers to and imposed certain obligations on the State concerning preparedness against war with respect to the colleges which might be established pursuant to the act.

5. The States have made provisions to carry out the Morrill Act, have exercised the power which Congress clearly intended that they should exercise under that law, and have maintained a system of compulsory military instruction in the colleges since the act was passed. The Supreme Court of California has held that the Statute and the Regulations of the Regents thereunder, are constitutional.

These five propositions seem to the writer elementary and indisputable.

Power of Congress to Induce State Cooperation For Defense, Not Open to Question

Counsel for the appellants, in the copy of the Petition for Appeal and the brief in support thereof, which this writer saw, do not deny or question the power of Congress to enact the Morrill Act of 1862 and to authorize the States to cooperate with the National Government in training persons for the military service in the manner indicated in the Act. The writer deems this question of power so free from doubt that it will not be pursued further. No *delegation* of power

by Congress is involved; it is simply a question whether Congress, in the reasonable exertion of the war power, may, for a consideration, in the matter of training young men, induce State cooperation in the field of national defense. That Congress may constitutionally do so, has never been and cannot now be seriously challenged.

Power of States to Accept Morrill Act, Cannot Be Challenged

Neither, as the writer understands, do appellants deny that the States had the power to *accept* the provisions of the Morrill Act, found colleges in compliance with its terms, receive the funds from the Federal Government, and maintain a system of military training therein in some form, as contemplated by this Act. The existence of such power must be assumed in the circumstances. It would be rather late now to raise the issue seriously. Obviously, the States could found colleges at their pleasure and prescribe in the curricula that certain courses be taught therein. As more fully appears later in this brief, rigidly prescribed curricula were the rule when the Morrill Act was passed. No departure from an educational policy, virtually universal, was contemplated.

Appellants' Positions Simmers Down to Issue of Religious Freedom

State power to provide military training in these colleges, as evidenced by the Morrill Act of 1862, (12 Stat. 503-504), the Act of 1866, (14 Stat. 336), permitting assignment of army officers as professors of military science, and the National Defense Act of June 4, 1920, (41 Stat. 759), must, we think, be conceded; so must also be conceded the proposition that the States may in part effectuate their obligations

under the Morrill Act through cooperation with the national government through the R. O. T. C., by virtue of congressional authorization. There is plainly no abridgement of the privileges and immunities of appellants as citizens because of their exclusion on account of nonconformity. The privileges and immunities clause cannot be invoked to nullify another specific grant of power, such as the war power. Adair v. United States, 208 U. S. 161, 180.

The fact that military tactics is *compulsory,* then, seems immaterial, except upon the contention that cnscientious objectors are denied religious liberty within the protection of the Fourteenth Amendment. This seems the most plausible ground on which appellants stand. If the States have the power—and it is their legal duty in any event, to go this far —to *offer* courses in military training, pursuant to the moral obligations resting upon the State under the Morrill Land Grant Act, it would seem to be equally within their power to make such attendance *compulsory,* whether the Morrill Act contemplates compulsion, or not. This they have done. Nothing in the Land Grant Act restricts the power of the States in this regard. If there be any limitation upon the power anywhere, and if the power may not be exerted as it was in California, it must be because the Constitution of the United States contains an inhibition, express or implied. No express inhibition exists; the sole contention which merits serious attention seems to be that the Fourteenth Amendment renders void the statute of California and the regulations of the Regents thereunder as an infringement of religious liberty.

In its essence the holding in Gilbert v. Minnesota, 254 U. S. 326, supports the foregoing when it points out that the States have a definite interest in the national defense. The argument of the appellant is, in part at least, predicted on

the position—as was Gilbert's in the cited case—"that a State has no interest or concern in the United States or its armies or power of protecting them from public enemies." 254 U. S. p. 328. The technical argument of appellants here leads to this conclusion as it led to it in Gilbert's case.

> This court said: "Undoubtedly, the United States can declare war and it, not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them—whether it is repellant and adverse or eager and militant; and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States, is a service of patriotism; and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the soverignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all . . . . This was the view of the Supreme Court of the State, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that

> the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty . . . . Numerous cases were cited commencing with Moore v. Illinois, 14 How. 13, and terminating with Halter v. Nebraska, 205 U. S. 34.
>
> "The latter case is especially pertinent in its sentiment and reasoning. It sustained a statute of Nebraska directed against the debasement of the National flag to trade uses against the contention that the flag being the National emblem was subject only to the control of the National power. In sustaining the statute it was recognized that in a degradation of the flag there is a degradation of all of which it is a symbol, that is, 'the National power and National honor' and what they represent and have in trust. To maintain and reverence these, to 'encourage patriotism and love of country among its people,' may be affirmed, it was said, to be a duty that rests upon each State, and that 'when, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State.' "

The contention of appellants that California may not make "the national purposes its own" in so far as these are expressed in the Morrill Act and later Congressional Acts to which reference has been made, and require its citizens who take advantage of the *privilege* (Waugh v. Mississippi University, 237 U. S. 589) of attending the State University, to study prescribed courses in military tactics, is untenable in the light of the Gilbert case; and the objection that the States are trespassing on Congressional power, in the form suggested by the dissenting Chief Justice and by Mr. Justice Brandeis in the Gilbert case, is met by the fact that Congress not only both *expressly* and *impliedly* empowered the States to *cooperate* with the Nation in the matter of training prospective soldiers and officers for the army, but *invited*

them to do so by inducements contained in the Morrill Act, indeed, made such cooperation a condition precedent to the right to enjoy the bounties of the Act.

Appellants' Contention Re Religious Liberty Untenable

It is the contention of *amicus curiae* that, inasmuch as the California statute and the action of the Regents thereunder is justifiable under the war power, and the grant of power to the States by Congress, the language of this court in United States v. Macintosh, 283 U. S. 605, is controlling against the appellants upon the only point having even plausible merit, namely that they are conscientious objectors. The fact that this was an alien case is unimportant. The language was deliberately chosen, is pat, and should be controlling in this case.

The position of appellants that they are conscientious objectors and that therefore California, in excluding them from the University, because they refuse to take military tactics, infringed the right of religious freedom, alleged to be specially secured them by the Fourteenth Amendment, is not tenable either on principle or authority. It has never been held by this court that the privilege of the conscientious objector to avoid bearing arms comes from the Constitution; during the entire history of this country that privilege has come from acts of Congress and not from the fundamental law. It is true that in many States Constitutions have contained language doubtless intended to insure that true conscientious objectors would not be subjected to the bearing of arms in violation of their conscience. It has never been held, however, either under the First or the Fourteenth Amendments, that the United States Constitution protected the citizen against this obligation of his status.

In Jacobson v. Massachusetts, 197 U. S. 11, at p. 29, this

Court, in speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said: ". . . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

In United States v. Macintosh, supra, at page 624, this court said: "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general."

When one speaks of the will of God, one speaks in impressive language. When a man claims that his conscience as a Christian or as a religious man, will not permit him either to take military training in college or to take up arms for his country in case of attack, he must be accorded the benefit of whatever doubt the average person may entertain because of inability to understand the mental or spiritual attitude which dictates such a course. Appellants in this case are members of the Methodist Episcopal Church, a Christian denomination. Historically Christianity obtained its foothold in most of the civilized countries of Europe by the power of the sword. And when it is suggested that the obligation of citizenship must be held subordinate to the obli-

gations to God, let it not be forgotten that the Founder of Christianity Himself said, "Render unto Caesar the things that are Caesar's, and unto God the things that are God's." Christ Himself recognized the obligation of the subject to the sovereign and did not attempt to belittle the force of the duty of the citizen to the State. When the Methodist Episcopal Church in 1932 at its General Conference undertook to make military training a matter of conscience and thereby to protect the vast number of its adherents, young and old, against the obligation under the laws of many States to take military training in certain of its colleges, they laid the foundation of a claim, if approved by the courts, which may result in a complete paralysis of the government in time of war and render it impotent to repel enemies in case of attack. If a mere pronouncement by the General Conference of this great body or by the general body of any of our Christian denominations, be sufficient to establish opposition to war and preparations for war as a religious tenet of the church, then all other denominations can withdraw from the reach of the United States Government in any crisis the major portion of that part of the population which normally would bear arms. It is not for one moment believed that this pronouncement of the General Conference reflects the deliberate sentiments of the millions of fine citizens who constitute the general membership of the Methodist Church.

Whatever may be the facts with respect to the sincerity of the appellants in this case, and the writer of this brief raises no challenge against them on this score, it is nevertheless a fact of far-reaching significance that if their contention prevails in this Court the result will be to make it possible to withdraw the main defensive strength of the United States from the reach of the Government in any military crisis. It is respectfully submitted that if there be any doubt on the

score of the soundness of the appellants' claim that doubt should be resolved in favor of the United States and of the principle on which it rests its power to protect its own integrity and the lives of its own citizens in case of war.

May the Land Grant Colleges Make Study of Military Tactics a Condition of Matriculation, or of Remaining in School?

This is the point of principal concern to *amicus curiae*. It is the position of the writer that it was the intent and purpose of Congress when the Morrill Act was passed that study of military tactics be compulsory; and that this was uniformly the interpretation of State and National Officers, concerned with the administration of the law for over sixty years, until recent agitation against war sought to force on the country a contrary conclusion. Clearly, if compulsory military tactics be an obligation of the original grant, appellants have no standing on any theory except that the action complained against is an unconstitutional infringement of religious freedom.

The Language of the Act

Section 4 of the original land-grant (Morrill) act reads:

> 1. "Sec. 4. And be it further enacted, That all money derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land script hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in sec 5 of this act), and

> the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading *object shall be,* without excluding other scientific and classical studies, and *including military tactics, to teach* such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." 12 U. S. Sts. ch. 130 sec. 4 p. 503.

The act is *general* in its requirements concerning "agriculture and the mechanic arts," but it becomes *specific* respecting military tactics by mentioning by *name* a *course* at that time rather restricted in scope and content. In the former general field, much latitude was allowed and intended; in the latter, no latitude is given, but the subject named must be *taught,* not just *listed* to be pursued at the option of the students.

The language of the law seems so plain as to exclude the need of refinements in interpretation. The second clause, emphasized above, was introduced into the bill for the first time in 1862. It had not appeared in this section of the bill, virtually identical in other respects, which President Buchanan vetoed on February 24, 1859. The fact that the language was interpolated doubtless explains the somewhat awkward phraseology.

There were main or primary purposes which the Congress of 1862 wanted to accomplish, one, widespread education calculated to develop proficiency in the mechanic arts and more scientific agricultural methods, and, the other, such military training that there would always be scattered throughout the nation a number of men so grounded in the principles of military science that no emergency would again

find the country so woefully deficient in the materials out of which efficient officers and privates can be readily and hurriedly made as had been the case in 1861. Such appears to be the plain meaning of the law.

The act makes it the duty of the beneficiaries *"to teach" military tactics*. There can be no teaching of a subject without students. If, therefore, there be a legal duty to *teach* a *specified* subject in a certain institution, is there any escape from the conclusion that it also is the legal duty of that institution to *require* students therein to take the *subject* which it is under an obligation to teach? To answer this in the negative is to convict the men who framed the law of an absurdity. They knew the English language as well as we do; they knew that *at that time* "to teach" did not mean the same as "to offer" optional courses, for electives in the first two years were practically unknown. If a college accepted the act it *agreed "to teach" military tactics;* it, therefore, necessarily agreed to *require* male students to take the course, for otherwise it would be impossible to carry out an unconditional promise to teach it; and such for sixty years, was the universal understanding.

Elective System Virtually Unknown in 1862

The fallacy of the position that it is not the duty of the beneficiary colleges to teach military tactics to all students therein, unless excused for cause, becomes obvious when the language of the act is studied in connection with the prevailing educational practices and methods at the time of its passage. *The leading colleges and universities in the country at that time were either without electives of any sort in their curricula, or the privilege to make a choice of subjects or courses was restricted within very narrow limits in the Junior or Senior years.* The only noteworthy exception was

the University of Virginia, which, under the leadership of Jefferson, opened with an extensive elective system in 1825.

The catalogue of Yale, for the year 1862-1863, maps a four year curriculum without a single elective, except in the case of students who desire to pursue the higher branches of mathematics who were permitted, during the first two terms of the junior year, to choose differential and integral calculus in lieu of Latin and Greek. The catalogue of the Massachusetts Institute of Technology, for the year 1866-1867, shows *no electives,* save one specialty in a professional course. The Harvard catalogue for 1860-1861 and 1863-1864 has a rigidly prescribed course for the first two years, permitting only a very limited choice of courses in the junior and senior years. On October 19, 1869 President Eliot said in his inaugural address, among other things, "At present the freshman year is the only one in which there is a fixed course prescribed for all." The fight for the elective system at Harvard—then the leader in education—had been going on for some time. Seven years before, as stated, this educational leader among the schools had virtually no electives in its curriculum. Significantly, the elective system first crept into the *senior,* then the *junior,* then the *sophomore,* and finally the *freshman* year, whereas military training was always and uniformly required in the *freshman* and *sophomore* years. With this situation the members of Congress were fully familiar. At Harvard the senior year became elective in 1872, the junior in 1879, the sophomore in 1884, and in 1894 the system had been completely adopted. Administration of the College Curriculum, William T. Foster, p. 128, and *passim.* Precisely the same is true of the Iowa University course for 1873; and the University of Michigan, in 1865, permitted no choice before the senior year, and then only within sharp limitations.

When the act was written, electives in freshman or sophomore curricula were virtually unknown, and when electives were permitted anywhere, special fees were usually charged; a fully prescribed and rigidly required course was the general rule. Had Congress intended that the beneficiary colleges merely introduce military tactics as an *elective course*, thereby making a departure from the general rule in educational theory and practice, explicit language, disclosing such intent, would have been used. Congress would not have made it a duty "to teach" military tactics, but rather to add it as an elective in the first, second or later years. Logically such training should be begun in the first year; but in no college of recognized standing of that day, except the University of Virginia, it is believed, were electives found in the first two years. The language used by Mr. Morrill, later quoted herein, clearly shows that he and his associates in Congress understood that "to teach" meant just what it says, a duty to *require* students in these colleges to *study* military tactics.

Contemporaneous History

The foregoing conclusion as to the real purpose and intent of Congress, to which the language of the act leads, finds ample support in the conditions and circumstances under which the law was passed, and they must be considered in order to reach a correct result. Of course, the object of all legal rules of statutory interpretation is to ascertain and give effect to the legislative will.

Justin S. Morrill of Vermont was the chief sponsor of the bill and its leading spokesman in Congress. The cold record leaves no room for doubt respecting his understanding of the purpose of the clause concerning military tactics.

Speaking on the Senate bill, which less than a month afterwards became a law, he said:

> "Something of military instruction has been incorporated in the bill in consequence of the new conviction of its necessity forced upon the attention of the loyal states by the history of the past year. A total unpreparedness presents too many temptations, even to a foe otherwise weak. The national school at West Point may suffice for the regular army in ordinary years of peace, but it is *wholly inadequate* when a large army is to be suddenly put into service. If we ever expect to reduce the army to its old dimension and again rely on the volunteer system for defense, *each state must have the means within itself to organize and officer its own force.* With such a system as that here offered —nurseries in every state—*a sufficient force would at all times be ready to support the cause of the nation and secure that wholesome respect which belongs to a people whose power is always equal to its pretensions* . . . ."
>
> See Cong. Globe 37th Cong. 2d Sess. Pt. 4, App. p. 256.

"In a free government we have proved, notwithstanding some 'in time of temptation fall away,' that patriotism is spontaneous, but doubtless many valuable lives would have been saved in the progress of this plague-spotted rebellion had we not so long assumed that military discipline was also spontaneous. If ever again our legions are summoned to the field, let us show that we are not wholly unprepared. These colleges founded in every state will . . . to some extent guard against the sheer ignorance of all military art which shrouded the country, and especially the North, at the time when the tocsin of war sounded at Fort Sumter." U. S. Experiment Stations Office Bulletin 152-157, p. 91.

"Mr. Morrill, the author of the bill, in making his great speech on this subject, said: while the world is

> in a transition state and all lands do not yet rest from war, the art cannot be wholly neglected, inasmuch as it is still true that, 'one sword keeps another in its scabbard,' and therefore something of military science and discipline as an incident of these national colleges is provided for and *will be obtained by all of their students,* supplying in an emergency to each state a valuable aggregate of available knowledge, and that without any charge to the national government." Hearings before the Committee on Military Affairs, H. R. 8538, 1st Sess., 69th Cong. (1926).

It is plain from the language used by Mr. Morrill that he understood that the provision for military tactics was not optional, but obligatory in the sense that there must be actual military training of all students in all Land Grant Colleges, for otherwise how could he feel sure that an "efficient force would at all times be ready," if the study of military science were optional with the students? Clearly, such language was wholly inapt had he supposed that it was optional with the colleges whether or no their students should study "military tactics." Indeed, experience since has demonstrated that the result of changing from the compulsory to the optional is to reduce the attendance in tactics about sixty per cent. While there still lingered some of the old opposition to the proposed distribution of the public lands, no one challenged the interpretation or the wisdom of the proposed measure concerning military tactics, as stated by Mr. Morrill.

Let us consider in more detail the history of the clause concerning military tactics. Mr. Morrill introduced a Land Grant College bill in the first session of the Thirty-fifth Congress, on December 14, 1857, when it was referred to the Committee on Public Lands. H. R. 2. The bill was adversely reported on April 15, 1858; Mr. Morrill amended

his bill by striking out everything after the title and inserting a new measure, on April 20, 1858, which amendment was agreed to on April 22, following. On the same day it passed the House. This substituted bill made no substantial changes in section 4 and in neither the original nor the amended bill is there any reference whatever to the teaching of military tactics. In all other respects, pertinent to the present inquiry, section 4 of this bill was identical with section 4 in the act which was approved on July 2, 1862. The measure passed both houses of Congress, but was vetoed by President Buchanan.

On January 15, 1862, the legislature of the State of Michigan passed a resolution calling on Congress to appropriate two hundred thousand acres of land to endow a military school in that State. The preamble recites the necessity, in view of the experience in the war, of diffusion of "knowledge of the science and art of war among the people." Misc. Doc. No. 38, 37th Cong., 2d Sess.

With the current reverses of the Civil War as a background and this resolution from the State of Michigan, and possibly demands of a like nature from other States before it, there was introduced in the Senate, on May 5, 1862, a land grant bill sponsored by Senator Benjamin F. Wade

the House a land grant measure (H. R. 138) which, on December 16, 1861, was read the first and second time. These bills were substantially identical in language and wholly so in purpose, with one important exception shortly to be noticed. In the bill introduced by Mr. Morrill the language concerning the subjects of instruction in and describing the purpose of the colleges to be established under the act, was as follows: ". . . where the leading object

shall be, without excluding other scientific and classical studies, and *without excluding military tactics,* to teach such branches of learning and mechanic arts as are related," etc. In the bill introduced by Mr. Wade, the permissive feature of the House Bill concerning military training, emphasized above, had disappeared and the language had become *mandatory in form,* exactly as it appears in the act approved by President Lincoln on the second of July, 1862, and set forth above.

It would seem, in view of this legislative history, that the purpose of Congress is not in doubt. Beginning as early as 1857, or before, with a measure making no reference to military training, we pass to a bill in the House, in December, 1861, which makes military training permissible and optional, and in precisely the same category as classical studies; but in May, 1862, we find the Senate bill unequivocally removing military tactics from the optional field and putting it on an obligatory basis.

President Buchanan had vetoed a similar bill on the general ground that Congress had no constitutional power thus to give away the public lands and that education was a State rather than a national function. In neither of these measures, however, had there been any reference to military

unanimous view of historians, that the Civil War had forcefully brought to mind the need for military education on a broader scale than was afforded by the institution at West Point, as Mr. Morrill indicates. The situation in 1862 was so manifestly grave that to guard against its recurrence in another crisis might well become one of the major objects of new legislation. Mr. Morrill spoke the minds of the times, and Senator Wade wrote into the act a provision which really constitutes the consideration to be received by

the nation at large for the liberal gift to such colleges, namely: that requiring the training of young men for the defense of the country.

Official Interpretation

Federal

In 1923 the Department of the Interior, which administers the act, in an opinion which makes no reference to the history of the act, the purpose of Congress, or the practical construction of the law for over sixty years, definitely held that Wisconsin did not lose benefits under the law by discontinuing military training as a compulsory, while retaining it as an optional, course. This was merely and purported to be no more than a declaration of *policy*. It was published in 1925. In 1930 an opinion signed by the Attorney General of the United States to the same general effect was promulgated. Consideration will be given to this opinion later in this brief.

On the other hand, the interpretation put upon the clause in question by the War Department has never been in doubt. It has always taken the position that it was obligatory not only to require all able-bodied male students, not excused for cause, to pursue a course of study in military education and training, but that the requirements of the law in this behalf were not met by perfunctory or merely colorable compliance with the letter of the act. It was in response to a letter in which the position was taken by the War Department that training was compulsory that the Interior Department stated its policy. Obviously, we are confronted by a question of law, not by one of policy. No department of the government has the legal power to waive any rights to which the Nation was entitled under the Morrill Act,

merely because it may be more comfortable or convenient as a matter of policy to do so.

The proceedings of the Association of American Agricultural Colleges and Experiment Stations unequivocally show that the War Department has steadily insisted that time should be liberally given to such instruction. Order No. 65, which was discussed at the meeting of this Association in 1904, indicates the attitude of the department on the subject. Speaking at that meeting, Mr. Patterson said:

> "When Order No. 65 came I had a conference with the Commandant, and I said, 'It matters not whether it subjects us to any inconvenience in other directions or not, you must carry out loyally the spirit of this order and its intent, and if five hours is not sufficient, you will have to take a sufficient amount of additional time from other duties connected with the college.' The military instruction is a popular feature in our institution." Bulletin No. 153, Offiice of Experiment Stations, p. 100.

That the army officers in charge of military education at some of the colleges were of the same opinion will appear later.

At this same session of the Association, Mr. Atherton, for the Committee on Military Instruction, said:

> "The chairman of the committee has had two prolonged interviews with the Chief of Staff of the army, the first of which resulted in an extension of the detail of military officers to colleges from two years to three, and the second in a better mutual understanding of some of the points at issue between the colleges and the department. The position of department, stated in the briefest form, is this, that, since the government furnishes officers and equipment for giving military instruction, it has a right to expect both a hearty cooperation and an equivalent return from the colleges:

> *That, since military instruction is the end sought by the law and by those who are charged with the administration of, it on behalf of the government,* that instruction should be made efficient, and the colleges should, as far as necessary, organize their schedules of work accordingly; and still further, that, while these details are of great advantage to the individual officers concerned, and thus to the entire military establishment, yet the primary need of the army is to have its officers directly at work with their respective commands. Ibid., 31, 32.

From Captain Ira L. Reeves, U. S. Army, in "Military Education in the United States," (1914): "Let it be understood that the only civil institutions of learning in the United States in which *instruction* in military science and tactics is *mandatory under the federal law are* the Land Grant Colleges." P. 79. The same view was taken by Brigadier General C. J. Bailey, U. S. Army, quoted idem, pp. 85, 86. He thought three hours per week the *minimum* to meet the requirements of the United States Government.

Major J. M. Lenihan, U. S. Army, said in 1910: "The law which *requires* that military instruction be *given* in Land-Grant College is contained in an act of Congress approved July 2, 1862, by President Lincoln . . ." Id. p. 86.

Captain Reeves: "By a land grant institution *instruction* in military tactics is required." Id., 248. This conviction runs all through this scholarly and complete work, and is many times expressed.

"They are *required* by federal law to give instruction in military science and tactics . . . ." Ransom, "Military Training," etc., p. 223.

"March 9, 1911. Approved by Secretary of War. Memorandum from Chief of Staff to Secretary of War.

"Lieutenant Mumma, P. M. S. & T., State University of Iowa, inquired if he had correctly interpreted War Department orders requiring a minimum of 3 hours per week to be devoted to Military Science and Tactics and that each and every student must do that amount of work to complete the requirement.

"Quote Memo:

" 'Par. 27 in General Orders No. 231, 1909, prescribes the minimum course . . . . This means that each student of the college will, during each of the two years of his college course, be required to receive military instruction during an equivalent of 84 hour periods. Failure on the part of the college authorities to require each student to devote this minimum of time to military instruction must be regarded by the War Department as a lack of compliance with its regulations.' "

Letter from Henry Breckenridge, Secretary of War, February 20, 1914, to Dr. George E. Vincent, President, University of Minnesota: "In response to your letter of December 1, 1913, asking for a War Department ruling upon the right of a State educational institution 'to exempt any of its first or second year students from military drill,' I have the honor to inform you as follows: . . . .

"While the University of Minnesota is a State institution, it nevertheless receives considerable support from federal funds, amounting to $137,529.17 a year; so from this you must see comes the obligation of the University and your responsibility as governing head of the institution to see that the requirements of par. 27, General Order No. 70, W. D. 1913, are carried out. In this paragraph no exception is made and *all students in their first and second years should receive the military drill and training as laid down in Revised Statutes 1225.* As long as the schools mentioned

in your letter receive federal funds it is clear that there should be corresponding assumption by these students of the obligations laid down in the original act of 1862. . . ." (Emphasis is ours.)

General Wood, speaking of need of 45,000 officers for contemplated army of 1,000,000 men, at hearing on Preparedness for National Defense: "We have got the material in part, under the Morrill Act, which was passed to meet a situation just such as would confront this country in case of war—absolute shortage of officers. We *established the land-grant agricultural colleges with compulsory military training.*" (Emphasis is ours.) Hearings, Com. on Military Affairs U. S. Senate, 1916, Parts I-XXI, p. 79.

Buchanan, in his veto of a bill virtually identical with the Morrill Act, save for the feature of military training, said: "It is true that the State legislatures are required to stipulate that they will faithfully execute the trust in the manner prescribed by the bill." Messages and Papers of the Presidents, Vol. VII, p. 3077. President Buchanan was clearly conscious of the fact that the States assumed an obligation in return for the bounty of the National Government.

The War Department was intimately concerned with the practical administration of this feature of the Morrill Act for more than half a century, before the Interior Department made its superficial pronouncement, but this practical interpretation the Attorney General ignored.

State

That the States, or their official spokesmen, supposed that one condition of the grant of federal aid was that military training be required of students attending the beneficiary colleges may be abundantly supported by citations to the public records. Only a few scattered references are possible.

Michigan. In the report of the United States Department of Agriculture for the year 1865, at page 166, Michigan reports among the general objects of the institution instruction in military tactics "as ***required*** by the act of Congress. The legislature, promptly at the first session following the approval of the act by President Lincoln, passed a law establishing a military school in connection with the Agricultural College, for the teaching of military tactics. Laws of 1863, p. 211. Obviously, the Michigan legislature was of the opinion that an obligation in this regard was assumed in accepting the act of Congress. This State, at that time, had little or no acquaintance with electives; as has been shown, its university permitted no choice during the first three years. Tactics have always been compulsory in Michigan.

In an early catalogue of the Michigan State Agricultural College (1864, p. 14) it is said that the act of Congress "contemplates ***instruction*** in military science." Of course, this does not mean electives, for reasons already given. Substantially this statement appears in later catalogues. In 1884 Lieutenant J. A. Lockwood was detailed by the President to Michigan. Military training is much emphasized in speaking of the purposes of the Michigan institution. No one can examine the early records of that state, concerning

the act of Congress, and come to any other conclusion than that giving instruction was deemed mandatory.

Minnesota. On May 7, 1869, a report on organization was made to the Board of Regents of Minnesota, in which this significant statement appears: "It is recommended that the Board of Regents meet the *requirements* of the law of Congress by making ample provision for instruction in military engineering . . ." Instruction is here assumed to be obligatory, for, of course, otherwise this language is inapt.

Iowa. The history of Iowa duplicates that of Michigan, Minnesota and other states. "All able-bodied male students of the College are expected to drill . . ." Fourth Biennial Report of the State Agricultural College, pp. 46, 47. This department, we are told, was established "pursuant to the act of Congress." As has been shown, there were no *electives* in the University of Iowa the first two years. Clearly, drill was obligatory to *all*, because such was supposed to be the meaning and intent of the law.

Arkansas. In Arkansas the situation was nearly the same as in Iowa, even to the language used. Report, United States Department of Agriculture (1874), p. 314. The same is substantially true of Vermont. *Ibid.*, p. 345.

West Virginia. On November 30, 1867, the governor of West Virginia reported to Schuyler Colfax, speaker of the house, that instruction was given in his college in "military tactics." He does not report that tactics has been introduced as an *elective*. House Misc. Doc. No. 21. 2nd sess., 40th Cong. "The National gift was, therefore, accepted by the legislature, and a Board appointed to organize the institution, with instruction to 'establish Departments

of Education in Literature, Science, Art, Agriculture, and Military Tactics . . .'" Catalog, 1879-1880.

Illinois. The record of Illinois is unequivocal. It has faithfully sought to carry out the real purpose of Congress without equivocation or evasion. In the act of the Illinois Legislature, adjourned February 28, 1867, providing for the organization and maintenance of the Illinois Industrial University, now, by legislative act, known as The University of Illinois, paragraph 13 reads as follows:

"The Board of Trustees *shall* by and with the advice and consent of the Governor and Adjutant General procure all such arms, accoutrements, books and instruments, and appoint such instructors, as may in their discretion, be *required to impart* a thorough knowledge of military tactics and military engineering, and they may prescribe a uniform dress to be worn by the pupils of the University."

In due time a uniform was prescribed for all students.

This act warrants the inference, in view of later official declarations, that in the minds of the members of the Legislature, the Trustees were bound, under the Land Grant College Act, to require military training.

At the first meeting of the Board of Trustees of the Illinois Industrial University a committee was appointed "on courses of study and faculty for the Illinois Industrial University." That committee consisted of Regent J. M. Gregory of the University, Newton Bateman, Mason Brayman, S. S. Hayes, and Willard C. Flagg. First Annual Report of the Board of Trustees of the University, pp. 47 ff. The membership of the committee shows that we can depend upon their report as a document of intelligence and understanding of the situation and the conditions under which the University was organized.

The committee, construing the language of the Con-

gressional act, says: "The military tactics are *required,* and the scientific and classical studies are permitted. Such at least is the *common* construction of these clauses . . ." *Ibid.,* p. 47. The committee was clearly conscious of the difference between *required* and *elective* courses.

General Brayman, in charge of military training at Illinois, calls attention to the compulsory nature of the requirement that military tactics shall be a part of the *prescribed* curriculum. *Ibid.,* pp. 80-82. The committee on the courses of study uses the following language:

"Military tactics being specifically required by the Act of Congress, the development of this department, to such an extent as may be found practicable, should be undertaken at the outset. While the effect of this department will be to scatter through the State a body of men, so far advanced in military art, that, in case of war, they will furnish skillful officers, ready to drill and lead the volunteer forces of the country, it is the opinion of many experienced educators that the introduction of the military drill and discipline is of positive value for their educating influence. They will materially assist in the government of the institution, and tend to form those habits of order and punctuality, for want of which so many educated men fail of usefulness and success." First Annual Report of Trustees, p. 51.

The "Committee on Military Department," of which General Brayman was chairman, made a report. *Ibid.,* pp. 80 ff. Here again, it appears that the contemporaneous interpretation of the Congressional act was that giving of military training was obligatory, and that the experience of the nation in the emergency of the Civil War inspired the plan for compulsory military education in the Land Grant Colleges. On page 85 a resolution appears, which was adopted by the board. The first paragraph reads: "Resolved, That in *compliance* with the *laws* on *that subject,*

the military department of this University shall be established as part of the regular and necessary means of education." It is impossible to read this report with an open mind and still to doubt that the trustees conceived it to be their duty to require military training under the act of Congress.

One of the ablest of the able men who have held the position of Superintendent of Public Instruction in the State of Illinois, is Dr. Newton Bateman. At the inaugural ceremonies of the university, March 11, 1868, he delivered an address in the course of which he said:

"The purposes for which this University was established, the work which it must do and may do, are here stated and defined, by the supreme and authoritative laws of Congress and of Illinois, in a manner so plain that only the most hopeless ignorance or willful perversity can misconstrue or misunderstand them.

"It will be seen that the law in respect to the instruction to be given in the University is two-fold, *mandatory* and *permissive*—certain things must be taught, certain other things are *not excluded*. Respecting the latter the Trustees seem to have discretion; they may provide for them or not, as they see fit; in respect to the former, they have no choice or discretion whatever, they must provide for them, or violate their oaths and the laws.

"The departments of instruction for which the Trustees are positively and peremptorily required to provide, and that "in the most thorough manner,' are two: 1. 'Such branches of learning as are related to agriculture and the mechanic arts,' and 2. 'Military tactics.'

"Instruction in these is a *sine qua non,* a condition precedent, default in which would work the forfeiture of the endowment." First Annual Report of the Board of Trustees, p. 163.

Fully acquainted with educational tendences and methods, a force in the field of education far beyond the borders

of his own state, Dr. Bateman speaks with striking force when it is recalled that electives were the decided exception and rigidly prescribed courses the rule. Only intellectual dishonesty of the most brazen type can read his remarks and then maintain that he meant merely that such a course should be *offered* as an *elective* and that thereby the obligation imposed by the act would be fully discharged.

In the memorial addressed by the Board of Trustees of the Industrial University to the members of the Legislature for the session of 1869, appear these words in connection with the explanation of the request for appropriations:

"There is also greatly needed a drill hall, for the military and other exercises in inclement weather and in the winter season. The importance of such a building has been acknowledged everywhere, and most of the older institutions are now provided with gymnasiums. In our State where the nature of the soil almost forbids outdoor exercise during so much of the winter and spring months, this is doubly important, and the military tactics *required by Congress* can scarcely be taught without it." Appendix, Second Annual Report of the Board of Trustees, p. 366.

In the second report of the Trustees of the Industrial University, 1869, at page 3, it was said: "It (the University) is required, under the Statutes of Incorporation, 'to teach, in the most thorough manner, such branches of learning as are related to Agriculture and the Mechanic Arts, and Military Tactics, without excluding other scientific and classical studies.'" And again, at page 14: "Under the authority of the act of incorporation, the Trustees have prescribed that all the students shall wear the University uniform."

In 1870, the Regent said: "I need not make any new argument in proof of the importance of this department. (Military.) It is sufficient that it is the requirement of

the *laws* of *Congress* and of the State, and must, therefore, receive our attention." Third Annual Report of the Board of Trustees (1870), p. 49. He is not speaking of elective courses.

Evidently, if all the students were required to wear the uniform they were required to take military training. Yet we are told that "according to the plan of the University the students have been left entirely free to select their own studies." Second Annual Report of the Board of Trustees (1869), p. 62. The inference is incontrovertible that since they were free to select their own studies but were not free to refuse to take military instruction that instruction was regarded by the Trustees as a prescription of the law.

General Brayman: "The country has a right to demand, as it has done, that those receiving the benefits of an education here, shall be prepared to render patriotic and skillful service in war, and no young man should be deprived of the honorable advantages which such instruction secures, should his service be required." Third Annual Report of the Board of Trustees (1870), p. 73.

Again: "The *teaching* of military tactics is *required* of the University both by the law of *Congress* and by the *State law.*" Fifth Annual Report of the Board of Trustees (1871-1872), p. 48.

In the Reorganization Act it was provided:

"All pupils attending the said University shall be taught and shall study such branches of learning as are related to agriculture and the mechanic arts and as are adapted to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life without excluding other scientific and classical studies and

including for all male students military tactics." State Laws of Illinois (1873), p. 16, sec. 6.

Here again contemporary construction is of the greatest importance. *When this reorganization act had been in force for a year,* we find the following significant and unequivocal language: "By the law of Congress *and of this state,* the University is *required* to *teach* military tactics to its male students." Eighth Report of the Board of Trustees, p. 64. These men would have been surprised had some one suggested that the law could be satisfied by merely *offering* an optional course.

Ohio. Mr. Merrick, at hearing before the House Military Affairs Committee on Bill for Abolishment of Compulsory Military Training, said: "Military training has been in effect at Ohio State University since 1873 and has continued throughout the decades up to the present time without a cessation of its being a requisite course of the curriculum except for a period of a little over one year. In 1879 the following report appeared relative to the last legislative act on military training.

"President Orton reported:

" 'By the action of the last legislature, military training was made voluntary on the part of the students. This action remands the drill to an inconspicuous and unimportant place in college life. Human nature being what it is, it is certain that no body of students will submit for any great length of time to the peremptory exactions of efficient military training unless they are obliged to do so. When obliged to submit, the great majority find no hardship in it, and drill in such circumstances becomes fairly popular.'

"This statement was made by Professor Orton, who was then acting president of the university.

"By the end of 1880 President Orton made the following report as regards the training:

" 'By the act of the legislature at its last session, the section in the organic law of the university, which forbade the making of military drill compulsory was repealed. At its June meeting the board took action upon the subject, making drill compulsory upon the male students of the institution, with the exception of the regular members of the senior and junior classes, and such other students as should be excused by the president on reasonable grounds.'

"It can be noted from this action of the legislature in 1880, that no alternative could be suited to the occasion if the Morrill Land-Grant Act was not to prove abortive in its purpose as regards military training. No deviation has been made from the requirement feature since its reinstatement in those early days of speculation." Hearings before the House Committee on Military Affairs, 69th Cong., 1926.

Dean Edward Orton of the College of Engineering, Ohio State University, said in 1913 in speaking of the obligatory features of the Morrill Act: "The chief motive for the insertion of the military-drill requirement in the Morrill Act was probably to strengthen our feeble military preparedness by the creation of a body of educated citizen soldiery which in times of war would become an asset of great value to us." He then points out that the Civil War disclosed the need, although good educational reasons exist, for "*exacting* drill in land-grant colleges." Washington Print. Office, 1914, p. 4.

"This great sum of money goes to a large group of land grant colleges which are required to *teach* military science as a *condition* of their existence." Id., p. 13.

The Secretary of War is quoted by Dean Orton as saying

that "the law requires that military education *be given* with a view to training young men to act as sub-alterns of volunteers." *Id.*, p. 13.

Alaska. Military courses have been offered from the beginning at the Alaska Agricultural College and School of Mines. Under the description of this department in the Catalog for 1934 is the following: "Under the Morrill Land Grant Act of 1862 military training is *required.* The training is designed primarily as a part of the program of national defense . . . . " Italics theirs.

California. Section 6 of the Organic Act of the University of California (1867-1868) provides: ". . . And in order to fulfill the requirements of the said Act . . . . all able-bodied male students . . shall *receive instruction* . . . in military tactics in such manner and to such extent as the Regents shall prescribe. . . ." The catalog of the University of California for 1870-1871 contains the following language: "Measures have been taken to carry out the provisions of the Act creating this University, in respect to military instruction and discipline. . . . All able-bodied male students of the University are *required* to attend the military exercises." (Italics ours.)

Colorado. The Catalog of the State Agricultural College of Colorado for 1883-1884 states that "Military training is required of all male students, unless excused for physical disability." In the Catalog for 1908-1909, it is stated that "By Act of Congress all agricultural colleges are required to *teach military science* and tactics." (Italics ours.)

Cornell. Paragraph 4 of the Charter of Cornell University (1865) provides: "The leading object of the corporation hereafter created shall be to teach such branches of learning as are related to agriculture and the mechanic arts,

including military tactics." In the Register for 1868-1869 we find this language: "The University owes it to the United States Government that due development and prominence be given to the departments of Agriculture and the Mechanic Arts, and that ample opportunity be also afforded for instruction in military science . . . . To this college is confided the execution of that provision of the national act of endowment which requires that instruction be given in military tactics."

Delaware. The University of Delaware states in its catalog for the year 1890: "By the Act of Congress, July 2d, 1862, . . . military science and tactics become a part of the work of instruction." In its catalog for 1882-1883 it had provided that "Drill will be required of all male students."

Georgia. In the Catalog, 1889-1890, of the Georgia State College of Agriculture, University of Georgia, it was said: "In accordance with the provisions of the Land Scrip Fund military exercises are regularly held in this college, upon which attendance is compulsory, except when a student is excused by the Faculty on the ground of physical disability."

Kansas. March 3, 1863, the legislature of Kansas assented to the conditions of the grant and assigned the benefits to the Kansas State Agricultural College. Section 5 of the Act of 1863 provides: "The college shall consist of four departments. 1st. The Department of Agriculture. 2d. Mechanic Arts. 3d. Military Science and Tactics. 4th. Literature and Science." General Davidson of the United States Army was to be detailed to the college as soon as "his previous army engagements were closed." And "All male students of the college, not disqualified or special-

ly excused, will be required to attend all military drills and exercises." Catalog, 1868.

Maine. We find this language in the Catalog of the University of Maine for the year 1879: "By the Act of Congress granting public lands for the endowment and maintenance of such colleges, it is provided that the leading object of such an institution shall be, 'without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts." In the Catalog for 1883 it is said, "All able-bodied male students receive instruction" in military tactics. And in the Catalog of 1897, "Each student is required to take (military tactics) unless physically unfit."

Maryland. In 1879 the Board of Trustees of the University of Maryland reported, "The Trustees desire to express their conviction of the beneficial results secured by the observance of the military feature required by Congress. . . ." Report of the Board of Trustees, 1879.

Nebraska. In the University of Nebraska Catalog, 1876, it is said, "The University is endowed under the provisions of this Act, and instruction in military tactics is therefore, necessarily, a part of its curriculum."

North Dakota. The North Dakota Agricultural College was established by Act of the legislature in 1890 to receive the benefits of the Morrill Act. "The Act of March 2, 1890, sets forth the purpose of such college and the character of the work as follows: 'The object of such college shall be to afford practical instruction in agriculture. . . . The course of instruction shall embrace . . . military tactics.' . . . . The law distinctly states that military

instruction shall be a part of the curriculum of the college. . . . All male students classified in any of the regular college courses are required to drill." Report of Board of Trustees, 1895.

Oklahoma. That 1909 Catalog of the Oklahoma Agricultural and Mechanical College states that "This institution being one of the beneficiaries of the Act of Congress of 1862, instruction in military tactics is made compulsory." The requirement to teach military tactics was not specifically mentioned in the charter of the institution, as it is in the majority of such institutions.

Oregon. In describing the department of military science and tactics of the Oregon State Agricultural College, it is said in the Catalog of 1888: "Instruction in this Department is both theoretical and practical and is required by the Act of Congress, which contributed so large a part of the College's endowment."

Pennsylvania. The Pennsylvania State College Catalog for 1865 states: "The Act of Congress granting land script to the several States for the support of Agricultural Colleges, requires that all Colleges which receive the benefit of that endowment shall give instruction in the Tactics and Army regulations of the United States." Students with conscientious scruples were exempted from the requirement. "This Act of Congress was, in 1863, 'accepted by the State of Pennsylvania, *with all its provisions* and conditions, and the faith of the State . . . pledged to carry the same into effect.'" Catalog, 1865.

Indiana. "In 1865 Indiana accepted and claimed benefits under the Acts of Congress of July 2, 1862, and April 4, 1864, and assented to all the conditions and provisions in said acts contained." The benefits were assigned to

Purdue University. "The Act of Congress endowing the University requires that Military Science and Tactics be taught." Catalog of Purdue University, 1914.

Rhode Island. "All men students are required to attend classes in military instruction." Rhode Island State College Catalog, 1904.

New Jersey. In 1864 the legislature of New Jersey passed an act assigning the grant under the Morrill Act to Rutgers University for the benefit of its College of Agriculture. Demarest in his "History of Rutgers College" at page 458, states: "The military department established and maintained in accordance with the requirement of the land grant act, became at this time (in the '80's) more formally and strongly organized. . . ." The Catalog of the University for 1871 states that military training is required of those registered in the scientific courses, that is, in the College of Agriculture.

Washington. Since the year 1903 at least the Catalog of the State College of Washington has contained the following: "By both the State and National laws affecting this institution, it is obligatory to give military training to all male students."

Wisconsin. Before Wisconsin changed its mind on the subject, it took the following position. "It is provided by law that 'all male students of the University, of whatever college, shall receive instruction and discipline in Military Tactics, the requisite arms for which shall be furnished by the State.'" Catalog 1866-67.

Interpretation by Private Individuals or Non-Official Organizations

If time and space permitted it would be possible to extend this brief almost indefinitely by quotations from private persons construing the federal act as obligatory in the sense here used. Only a few must suffice. They are selected on the theory that the men whose opinions are set forth gave the subject careful thought; indeed, some, due to public or semi-public positions held by them, were under a certain duty to think and write correctly about the matter.

At the first convention of delegates from the Land Grant Colleges, convened at Washington, D. C., in 1885, Professor B. Maurice of Maryland, says that: "2. Military tactics should *be taught* as *required.*" Bulletin, U. S. Department of Agriculture, Office of Experiment Stations (1885), p. 111.

He thought the curriculum should follow that of the naval academy quite closely. Again, he said: "Here are their agricultural barracks, and they are all under a strict military discipline; for we must not lose sight of the fact that the nation requires, in exchange for a liberal grant of land-scrips to agricultural institutions, that military tactics should be *taught* there besides agriculture and the mechanical arts . . . . " *Ibid.*, p. 133.

Again, in 1895 at the meeting of the Association of Agricultural Colleges, a delegate from Georgia voiced the same view concerning the obligation to teach military training. *Ibid.*, p. 77.

At the eighteenth annual convention of the Association of American Agricultural Colleges and Experiment Stations, at Des Moines in November, 1904, representatives of forty-

three states attended. The subject of military education in the Land Grant Colleges received no little attention.

Mr. Buckman (Vermont): "As we have seen, the incorporation of military instruction into the curriculum of the colleges was intended to meet one of the great and permanent needs of the country. *Such instruction is mandatory upon the colleges.* By the acceptance of the grant with its conditions this instruction has become an obligation, recognized as such by the colleges. So much—that the colleges shall give instruction in military tactics—is, so to speak, constitutional, *unalterable,* not *debatable.*" *Ibid.,* pp. 92, 93. From this strong and explicit statement concerning the obligation of the colleges under the act there was not a dissenting voice in that convention of representative and intelligent men. Indeed, every speaker took it for granted that Mr. Buckman correctly interpreted the law.

Mr. Thatch (Alabama): "The act of 1862 explicitly requires such training, and I do not believe that we can comply with the spirit, or the letter of the law, without having military instruction of a very definite and fixed amount and nature." *Ibid.,* p. 95.

Mr. Van Hise (Wisconsin), later president of the University, discussed the minimum time for military instruction which, in his judgment, would comply with the federal act. He thought two hours weekly sufficient. He spoke directly after Mr. Thatch, but in no way questioned or dissented from the latter's positive statement that military instruction was mandatory under the act. *Ibid.,* p. 95.

On February 15, 16, 17, 1872, a convention met at Washington on the call of the Commissioner of Agriculture. It was there resolved, among other things: "At the same time it (the act), contemplated wisely the fact that the citizen must also, when necessary, become the soldier, and that

while with one hand he would feed and clothe the nation, with the other he would bravely and skillfully defend it. Hence the *requirements* in regard to military education." Misc. Doc. No. 92, 42nd Cong., 2nd Sess.

On November 14, 1913, Dean Edward Orton of the College of Engineering of the University of Ohio, read a paper before the Association at its meeting at Washington, D. C., on the status of the military department in the Land Grant Colleges. Speaking of "military tactics," he then says, among other things: "There is nothing *permissive* or *optional about it*. It means that it was intended by the framers of the law that military instruction should be an integral part of the training given by every Land-Grant College." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1913), p. 172.

And again, speaking of the purpose of the government to strengthen "our feeble military preparedness by the creation of a body of educated citizen soldiery," he says: "This motive is still the most important one which can be brought forward from the government's side to justify the expenditure which the military drill feature of the Morrill Act specifically occasions." *Ibid.*, p. 173.

Again, he says:

"My next thesis is that it is just as important, or more so, to the country at large and the War Department in particular, that the military work of our Land Grant Colleges be strengthened as it is to the colleges themselves. The officials of the War Department look at the provisions of the Morrill Act and the acts of 1890 and 1907, as being intended to remedy the terrible shortage of officers felt in the Civil War and later in the Spanish War." *Ibid.*, p. 178.

Speaking of the attitude of the War Department, he quotes the following:

" 'In this connection it may not be improper to invite your

attention to the fact that there is now and has been for many years in each of the several States an agricultural and mechanical college aided by the Federal Government, where the *law requires that military education* be given with a view of training young men to act as subalterns of volunteers. These colleges were created by the Morrill Act of 1862 and were further endowed and supported by the second Morrill, the Nelson, and subsequent acts. By these acts Congress sought to prevent in the future the serious shortage of the Civil War in officers and provided liberally in funds for this purpose, and yet, in spite of the earnest endeavors of the War Department, extending over a period of years, the purpose of Congress has been largely defeated, while at the same time its appropriations have been used. This is due to the failure of the acts to be specific in stating what shall be done and the failure to provide a penalty for the institutions not carrying out the purpose of the acts.'" *Ibid.*, p. 180.

In 1916 Dean Orton again said:

"The Morrill Act of 1862 laid upon the educational institutions created under its provisions the obligation to give military instruction." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1916), p. 152.

In 1917 Edmund J. James, late President of the University of Illinois, speaking before the Association, said: "We have already established a definite idea in the minds of the people of this Republic that the Land Grant College is not only entitled to *require* a certain amount of military discipline from its students, but that it is morally *bound* to make and enforce such requirements because of the history of its origin and development." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1917), p. 165.

President James is here pleading for an honorable and

good faith performance of a definite obligation to render to the nation that which is due it for the great gift of lands.

In 1926, the Association resolved that it "go on record as favoring the amendment of the basic law governing military training in land grant institutions in any ways necessary." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1927), p. 428.

Now, if the Association really believed it was full compliance with the "to teach" clause merely to offer optional courses to those who may or may not want them, what need is there for Amendment in this regard?

On January 10, 1929, Dr. W. O. Thompson, President Emeritus, Ohio State University, speaking before the assembled cadet corps at the University of Minnesota, said:

"The interpretation of this Act is important to its proper and complete understanding. The question of agriculture had been before the country, especially in Illinois and Michigan and in certain agricultural circles, for some time. When, however, the matter came up for consideration by Congress, the subject of mechanic arts was included because such vocations were considered to be a contribution to the national defense. The opposition to the Bill is not so important at this juncture but it is well to remember that the phrase 'without excluding other scientific and classical studies and including military tactics' was intended to do two things; first, to make it possible to teach outside of a strict interpretation of applied science and leave some discretion to the State; the second important fact is, that military tactics was included as a positive contribution to and an essential part of the Bill. Without these two features there is reason to believe that the Bill might not have been enacted into a law. Further the phrase 'in such manner as the legislatures of the States may respectitvely prescribe' was due to the fact that a strong factor in Congress recognized education as a state function. President Buchanan had vetoed this measure principally on the theory that the proposed legislation inter-

fered with the right of the States in education. The phrase under consideration was intended to prevent interference by the Federal Government and to protect the rights of the States in education which by many was regarded as a function of the State. *It forms no basis for the elective idea as applied to education in military tactics.*"

Again he says:

"As a further comment it may be added that the provisions of the Act of 1862 were accepted by all the States of the Union. These acceptances began at once and continued through a period of practically ten years, the time being extended by Congress an order to make abundant provision for every State in the Union to give the Act full consideration. It is important here to note that not a single State in the Union at the time of acceptance raised any objection to the subject of military science or military tactics as the statute expressed it. In other words this law as enacted was accepted by the States not on any theory of permission but on the theory of accepting a status universally recognized. That status was, that at least three things were to be taught; first, agriculture; second, mechanic arts; and third, military tactics. The phrase, 'without excluding other scientific and classical studies' permits the introduction of other than the three principal topics in the Act. Too often we overlook the fact that military tactics in the statute is on precisely the same basis as agriculture and the mechanic arts. Beyond question the country accepted those colleges on the ground that the three topics named were to be a part of the body of instruction in the colleges."

It would seem that enough has been said to show, almost to a demonstration, that the unambiguous language of the Morrill Act was understood, contemporaneously with and after its passage and approval, to impose a distinct and inescapable duty upon the colleges accepting its provisions to give instruction in "military tactics"; and that this duty could be satisfied, in accordance with the letter and the spirit of the law, by nothing less than an obligatory, as distin-

guished from an optional, course therein. Such is the testimony of the author of the law, of the War Department, and its representatives, of state legislatures and state officials charged with any duty in connection with the act, of private persons in public employment of representative associations; and such was clearly the supposed demand of the very emergency which resulted in the introduction of this obligatory clause into the act by Senator Wade. There is no need to resort to refinements in syntax or in the analysis of sentences from the grammarians' point of view. The language is plain; and the purpose, contemporaneously and subsequently expressed by responsible men and organizations, is even plainer. To exclude the light of contemporary and subsequent construction in extracting the purpose and intention of Congress is as unsound in law as it is indefensible in morals; and in such light but one conclusion is possible. One of the powerful arguments against similar bills, but without the clause concerning "military tactics," advanced by opponents in Congress, and by President Buchanan in his veto, was that the nation received nothing for this munificent gift. That position was completely and deliberately destroyed by the proponents of the Morrill Act; for in return for its bounty there would be in every state a "nursery" from which would come young men, fitted by special training, to become nuclei of a body of officers and private soldiers should the country again find itself at war.

The writer cannot forbear to pause a moment, before concluding this discussion, and focus attention upon two viewpoints which are usually ignored. In the first place, sober minded individuals, who have some acquaintance with other than the theoretical aspects of life, deny that there is any real force to the contention that two years of military tactics in college have the slightest tendency to create a "spirit of

militarism," whatever that vague and sonorous generality, as applied to our country, may mean. Any parent, who has taken conscious note of the shifting interests of his child, knows that the earliest proof that the glamor of struggle and conflict carries a strong appeal to the mind goes back to about the age of three or four. Swords, shields, guns, tin soldiers, all the implements of bloody war, are made in rough miniature and constitute the main attractions of the playroom. Why? Whence comes the inspiration to the young mind, scarcely yet in the twilight zone of awakening dawn? Is it some instinct primal; or is it the influence of the stirring tales of men and gods in mortal combat of which they hear from the old and beloved story books of childhood? Who knows? Perhaps next we shall have a "Committee of Censors of Nursery Rhymes and Tales." There will be some who will fervently praise Providence because their childhood is gone.

The mandatory requirement is in the law; and the States should not be encouraged to ignore it. The Supreme Court of Nebraska held expressly that the State is a trustee of the fund and is without power to divert it to any purposes other than those specified in the act. State v. Brian (Neb., 1909), 120 N. W. 916. In another case the State is held to be a trustee and the college the beneficiary. Yale College v. Sanger (1894), 62 Fed. 177, 185. This Court has said that the States should expend the funds "in accordance with the trust imposed upon them." Wyoming, etc. v. Irvine (1907), 51 L. ed. 1063. There is no escape from the conclusion that there is here an obligation closely akin to that of a conventional trust.

The Supreme Court of Massachusetts speaks of the "sacred trust under which the bounty of the general government was given." Massachusetts, etc. v. Marden (Mass,

1892), 30 N. E. 555. In the same case that great court virtually gives a judicial interpretation of the military tactics clause which fully supports our present contention. The court says that the legislature amended the charter of the Massachusetts Institute of Technology "so as to *require* it to *teach* military tactics in *conformity with the provisions of the act of Congress* . . . ." The contemporary catalogues of the Institute show that military training was required of all students accordingly.

36 Opinions of the Attorney General 297

On June 20, 1930 an opinion over the signature of Honorable William D. Mitchell was given the Secretary of the Interior, advising that "the policy of the Department of the Interior has been that a State fulfills its obligation under the law when it offers instruction and provides facilities for instruction in the branches of learning specified in the land-grant college legislation," that this policy was not in violation of the Morrill Land Grant Act of 1862 and that pursuant to this policy the Secretary was permitted to issue his certificate in conformity with the Act of Congress of March 4, 1907, to the effect that a State has complied with the Land Grant of 1862, notwithstanding military courses in its Land Grant College are optional rather than compulsory. The writer calls particular attention to the fact that this attitude is described as one of *policy*. The decision of the Attorney General was perhaps mainly rested on the proposition that after the policy of the Secretary of the Interior was published in 1925 Congress, in April, 1926, reenacted the fourth section of the Act of 1862 with the identical language unchanged, notwithstanding this interpretation. The Attorney General applied the principle laid down in National Lead Co. v. United States, 252 U. S. 140, 146-147; United

States v. Cerecedo Hermanos y. Compania, 209 U. S. 337, 339; United States v. Falk & Brothers, 204 U. S. 143, 149, to the effect that the reenactment of a statute while an administrative interpretation thereof is in effect, amounts to an implied legislative approval of the executive construction, for Congress is presumed to have legislated with knowledge of the established usage of an executive department.

On page 300 it is said in the opinion that the course in military tactics was compulsory in the years immediately following the passage of the act. In point of fact, military tactics was a compulsory course in all the Land Grant Colleges and has been compulsory until Wisconsin broke away in 1923, and Minnesota by action of the Regents, in 1934; and it is still compulsory in spite of the opinion of the Attorney General. In point of fact, the ruling has not been generally accepted as sound by the Colleges.

The Attorney General takes no notice of the fact that for sixty-eight years following the enactment of the Morrill Land Grant Act and for more than sixty years before the publication of the policy by the Department of the Interior, every official, State and National, concerned in the administration of the law, including the War Department and at least two Secretaries of War, interpreted this act to require that the courses be compulsory. The opinion concludes that the uniform interpretation of State and National officers of the highest integrity and ability shall be rendered nugatory and completely reversed because a political department of the Government, upon grounds of policy, reaches a contrary conclusion, and the year following the announcement of this conclusion, Congress inadvertently reenacts the statute in question without changing the phraseology. If this doctrine is to stand the test of this Court, it becomes a comparatively easy matter for a bureau or political branch of the Govern-

ment, by misinterpretation and the promulgation thereof, to amend in substantial particulars the deliberate enactment of Congress, unless by some chance Congress happens to come across the interpretation in time, in the mass of Governmental reports.

The cases relied on in the opinion of the Attorney General are important and ought to be considered. The leading case is doubtless National Lead Co. v. United States, supra. A brief quotation from the opinion of Mr. Justice Clark at once demonstrates the misrepresentative character of the position in this opinion as indicative of the true attitude of this Court. The language of the act there involved was concededly ambiguous. It had been interpreted a certain way for *almost forty years* by the Department of the Treasury; a contrary interpretation was insisted upon in the case before the Court. The interpretation of the Treasury Department was reasonable. The Court says:

> "From Edwards v. Darby, 12 Wheat. 206, to Jacobs v. Prichard, 223 U. S. 200, it has been the settled law that when uncertainty and ambiguity, such as we have here, is found in the statutes great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—*especially where such construction has been long continued*, as it was in this case for almost forty years before *the petition was filed.*" (Emphasis supplied.)

The contemporaneaus construction of the Land Grant Colleges; of the War Department; of officers of the United States Army of the highest rank and standing; and the continued interpretation for over sixty years, were entirely ignored by the gentleman who prepared this opinion for Attorney General Mitchell. Admitting that there is ambiguity in the Land Grand Act of 1862, purely

for the sake of the argument, that ambiguity, under the rule laid down by this Court and as stated above, has been settled by a construction which "has been long continued," to wit, for a period of more than sixty years; and the contrary interpretation promulgated by a political department of the Government had been announced for approximately one year when Congress reenacted the Statute and inadvertently overlooked the promulgation of a policy which appeared in a bulletin of the Bureau of Education.

In the case of United States v. Falk & Brother, 204 U. S. 143, also relied on in the opinion, it is to be noted that an opinion of the Attorney General in that case had been rendered and had been followed by the Department for *seven years* before it was challenged. At the end of the period of seven years Congress reenacted the statute without any change. It may be supposed that Congress will be on the watch for interpretation by the Department of Justice, solemnly made and printed in its opinions, and there is reason for holding, when such is the case and when the opinion of the Department of Justice has been acted on for seven years and Congress has reenacted the statute after that period without any change in the disputed language, that Congress knowingly and deliberately accepted the interpretation in the reenactment. No such situation or analogous situation confronted the Attorney General when the question on military training was submitted in 1930.

Attorney General Mitchell is an able lawyer and a conscientious man. It is, nevertheless, true, that it is physically impossible for the Attorney General of the United States to inquire personally into legal questions of the less important type. He must rely upon opinions prepared by subordinates in his Department. It is respectfully submitted that the opinion in this case not only does not do justice to the emi-

nent talent of Attorney General Mitchell, but it represents a perversion of the principles of the decisions of this Court and lays down a rule which, if sanctioned by this Court, will make it possible to amend the most solemnly enacted Congressional legislation by the interpretation of a political bureau, announced six months or a year before Congress inadvertently reenacts the same statute. No one can read the opinion without becoming convinced that Mr. Mitchell himself had no opportunity to go into the legislative history of the Morrill Land Grant Act, or of the contemporaneous and subsequent construction thereof by responsible officials of the State and of the National Government since its enactment and until Wisconsin departed from its own as well as the accepted interpretation by putting military training on an optional basis.

It is not wholly beside the point to advert briefly to the results of military training in the Land Grant Colleges. There served in the World War over 79,000 men who had been thus trained; according to imperfect and incomplete records over 800 thus trained served in the Spanish American War; and there served in the World War over 28,000 officers who had received their training in these schools. It is evident that the purpose of the Act has to some extent been realized since half of the men who served in the World War were officers, and more than half of the officers required to take charge of our armed forces during the World War secured their training in the Land Grant Colleges. It is, of course, perfectly well understood, and especially so by the opponents of military training in the Land Grant Colleges, that with the optional system in force, no such results, or anything approaching them, would have been or could have been shown. United States Depart-

ment of the Interior, Office of Education, Survey of Land-Grant Colleges and Universities, Section of Bulletin, 1930, No. 9, Vol. II, Part IV.

Respectfully submitted,

SVEINBJORN JOHNSON,

Amicus Curiae.

October, 1934.

FILE COPY

DEC 27 19

CHARLES ELMORE CR

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 55.

Albert W. Hamilton, a Minor, by Albert Hamilton, His Guardian Ad Litem, et al.,

Appellants.

vs.

The Regents of the University of California, et al.,

Appellees.

PETITION FOR REHEARING.

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Appellees.

PETITION FOR REHEARING.

Come now the above named appellants, Albert W. Hamilton, a minor, by Albert Hamilton, his guardian *ad litem,* W. Alonzo Reynolds, Jr., a minor, by W. Alonzo Reynolds, his guardian *ad litem,* Albert Hamilton, and W. Alonzo Reynolds, and present this, their petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

The Court seems to have misunderstood counsel's argument that appellants were entitled to a reversal under what we have called our privileges and immunities theory of the law. At page 9 of the opinion as printed in leaflet form by the clerk the Court says:

> "Appellants' contentions are that the enforcement of the order prescribing instructions in military science and tactics abridges some privilege or immunity covered by the first clause" (of the 14th Amendment) "and deprives of liberty safeguarded by the second".

At the top of page 10 the Court says:

> "The 'privilege' of attending the university as a student comes not from federal sources but is given by the state. It is not within the asserted protection. The only 'immunity' claimed by these students is freedom from obligation to comply with the rule prescribing military training."

May we respectfully point out that what the Court refers to in the sentence above quoted as "some privilege or immunity" was set forth at some length in our brief and in the oral argument with such apparent clarity that it did not occur to us that it would be misunderstood. In the brief of appellants what we have called our privileges and immunities argument began on page 14 with the statement in heavy type:

> *"Compulsory membership and service in the Reserve Officers Training Corps abridges the privileges and immunities of appellants as citizens of the United States, in violation of the 14th Amendment."*

We then set forth, first in a series of very brief statements, then in elaboration of the same points the following:

"Stated most concisely, our contentions on this point are as follows:

(a) The Reserve Officers' Training Corps is a branch of the Federal military service, maintained for Federal purposes.

(b) Without authorization by Act of Congress there is no power in the Federal Government (much less the State) to compel service in any branch of the Federal military establishment in time of peace.

(c) This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.

(d) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. (14th Amendment.)

(e) If it is said that the priveleges and immunities of appellants are not abridged because they are not actually being compelled to serve in the R. O. T. C., it is unquestioned that they have been suspended from the University for their refusal to render such service, and

(f) No State may impose, as a condition upon which it will extend a privilege which it may legally grant or withhold, the surrender of rights under the Constitution and laws of the United States."

May we consider briefly with the Court the proposition above designated (c)?

> "(c) *This freedom from compulsory membership and service in the Federal military establishment in time of peace is a privilege and immunity of citizens of the United States.*"

Perhaps we were unwise in adhering to the language of the 14th Amendment and describing our claim of freedom from enforced service in time of peace in the Federal military establishment as a "privilege and immunity" of citizens of the United States. Our thought was that the freedom we were contending for consists of the *privilege of* exemption from enforced service in time of peace, and an *immunity from* such enforced service in time of peace. It had not occured to us that the Court would think we were arguing that the "privilege" of attending the university as a student was the "privilege and immunity" which we were contending is abridged by enforced service in a branch of the Federal military establishment in time of peace. We have not at any time doubted that "the 'privilege' of attending the university as a student comes not from Federal sources but is given by the state". Nor have we doubted that that "privilege" is not within the asserted protection of the 14th Amendment.

The Court in its opinion goes on to say:

> "The only 'immunity' claimed by these students is freedom from obligation to comply with the rule prescribing military training."

We respectfully suggest that a more accurate statement of what is the "only immunity" claimed by these students is that it is freedom from the obligation to comply with the rule prescribing compulsory membership and service *in the Reserve Officers Training Corps which is a branch or unit or subdivision of the Federal government's military establishment.* We use the term "Federal military establishment" in contradistinction to the state military establishment which would include the State Militia, and any other military organization maintained by the state. On this point we quote from the Court's opinion at page 8:

> "The petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States."

We concur immediately in the judgment that the students do not "serve in the army". We respectfully urge, however, that the petition *is* to be understood as showing that students required by the regents' order to take the prescribed course thereby become a part of the military establishment of the United States.

The Federal Statutes.

The Reserve Officers Training Corps is established, created, and set up by section 381 of chapter 20 of title 10 of the United States Code Annotated, which is found in volume 10 of that code, bearing the general title "Army". The code is the "Code of the Laws of the United States", as enacted by Congress and approved in June, 1926, and incorporating all the laws of a general and permanent nature in force at the beginning of that session, that is, December, 1925. All existing laws are logically arranged under fifty titles. Title 10 is "Army". Chapter 20 thereof is entitled "Reserve Forces". Sections 351 to 371 inclusive deal with the "Officers' Reserve Corps." Sections 381 to 390, inclusive, deal with "Reserve Officers' Training Corps". Section 381 is entitled "Establishment of Training Corps." It authorizes the president to establish and maintain units of a Reserve Officers' Training Corps in civil educational institutions, including state universities and the land grant colleges established under the Morrill Law approved by President Lincoln July 2, 1862. It authorizes compulsory or elective courses in military training *at institutions other than state universities and land grant colleges.* It does not authorize compulsory military training in land grant colleges. The language of the section on that point is:

> *"Provided further,* that except at state institutions described in this section, no unit shall be established or maintained in any educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically

> fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War."

Thus we see that Congress has carefully refrained from authorizing compulsory military training at the land grant colleges, of which the University of California is one. Upon this point the law appears to have remained unchanged, since the enactment of the Morrill law.

Section 382 of chapter 20 is entitled "Eligibility to Membership" and limits membership "to students of institutions in which units of such corps may be established who are citizens of the United States, who are not less than 14 years of age, and whose bodily condition indicates that they are physically fit to perform military duty, or will be so upon arrival at military age".

Section 383 provides for admission of medical, dental and veterinary students to training corps for a course at the rate of ninety hours of instruction per annum for the four collegiate years.

Section 386a provides that advanced training need not follow immediately the two years' course in the colleges, showing again that the R. O. T. C. is completely controlled by the Federal government.

All of the sections above quoted seem to establish beyond doubt that the *Reserve Officers' Training Corps* is a part of the military establishment of the United States, and we respectfully submit that it is equally clear that students who are members of the R. O. T. C. do thereby "become a part of the military establishment of the United States".

The War Department Controls the R. O. T. C.

Now, in the opinion of the Court in the case at bar at page 8, as printed by the clerk, immediately following the statement that the petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States, we find this language:

> "Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary cooperation between federal and state authorities in respect of the military instruction given in the land grant colleges. *The War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State.*" (Italics ours.)

That may be a fair statement of the law as it was at some time in the past. Possibly it was the law governing land grant colleges and military training therein during the time when Mr. Justice Butler was a member of the board of regents of the University of Minnesota, which is a state university and which we understand is a land grant college. However, the law as it is today does not seem to support the statements of the Court just above quoted.

Section 385 of chapter 20 reads as follows:

> *"Courses of training.* The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of said corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training except as provided in sections 383 and 384 of this title."

In the face of that section, how can it be said that the allegation that the courses are prescribed by the War Department is not to be taken literally? How can it be said that "the War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions?" It seems to us to be fair to assume that the statements of the Court above quoted were deemed by the Court to be statements of vital importance and to constitute a part of a valid basis for the Court's decision. We have shown, we think conclusively, that those statements are not an adequate or correct statement of the law and the facts. If we are correct, then we are confident that the Court will be glad to reconsider its decision and to grant us a rehearing. The Court speaks of the "long established voluntary cooperation between Federal and state authorities in respect of the military instruction given in the land grant

colleges." There can be no question but that there has been voluntary cooperation. But that fact does not alter the fact that the courses in military instruction as prescribed by the Secretary of War are required to be given in all educational institutions maintaining units of the R. O. T. C.

Again, the Court says this:

> "The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the state."

How can it be said that the training is "exclusively prescribed and given under the authority of the state" when we have before us section 385 as quoted above?

At the University of California until about 1917 military training was required in the so-called "University Cadets." That was distinctly and exclusively a California and University of California military organization. But about 1917 the War Department at the request of the regents of the university established units of the R. O. T. C. in California. The courses had been compulsory in the University Cadets and were made compulsory in the R. O. T. C. Whether the same is true of the University of Minnesota during the time when Mr. Justice Butler was a regent of that university, we do not know.

The Asserted State Authority Conflicts With Federal Power.

On page 9 of the opinion, the Court, after mentioning that the states are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war, and that the state has authority to train its citizens for military service, the Court says:

> "And, when made possible by the national government, the state in order more effectively to teach and train its citizens for these and like purposes may avail itself of the services of officers and equipment belonging to the military establishment of the United States."

Of course that is true. It always has been true. Long before the establishment of the R. O. T. C. it was the practice of the states to do just that. Then the Court says:

> "So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizens by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends."

May we analyze that sentence briefly? Is the state's action within its retained powers when its action consists in coercing its young men citizens to join and serve in

the R. O. T. C. which we have shown is a branch of the Federal government's military establishment? Did the states when they ratified the Constitution, "retain" any power to trespass upon the exclusive authority of the Federal government in its field of raising, equipping, supplying and maintaining armies? Is it not clear that that power belongs exclusively to the Federal government?

And is not the imposing of compulsory service in the R. O. T. C. "inconsistent with" an "exertion of the authority of the national government?" Is it not clearly inconsistent with the authority of the national government, which has always carefully refrained from making military training in land grant colleges compulsory and even from authorizing such colleges to make military training compulsory, for the state to enforce a requirement that students must render service to the Federal government in training for war in a military organization which is established and controlled by the War Department?

Under Federal law, enlistment in the military academy at West Point is voluntary, as are all enlistments in the Federal military establishment in time of peace. Suppose the regents of the University of New York were to impose a requirement that students take a summer course in the nearby military academy. Would any court sustain such action as "not inconsistent with any exertion of the authority of the national government?" Would any court say that the state government may enforce military training in the United States military academy? The R. O. T. C. is as completely within the control of Congress and the War Department as is the West Point Academy.

And finally, in the sentence just above quoted from the opinion, the Court says that so long as the state action "transgresses no right safeguarded to the citizen by the Federal Constitution, the state is the sole judge of the means to be employed," etc. We maintain that compelling young men to surrender their immunity from compulsory service in time of peace in a branch of the Federal military establishment does transgress a right safeguarded to the citizen by the Federal Constitution. In effect, the regents of the University of California say to our appellants and to all students in their classification: "You will either surrender your immunity from enforced service in a branch of the Federal military establishment in time of peace or we will suspend you from your state university." And that is exactly what has been done in this case. We agree, speaking generally, that the state is the sole judge of the means employed and the amount of training to be exacted from students. But we insist that that fact does not warrant the state, through the regents, in demanding the surrender of the "privilege and immunity" of freedom from enforced service in any branch of the military establishment in time of peace.

Asserted Violations of Due Process Clause and of Privileges and Immunities Clause Are Distinct Grounds for Reversal.

We regret deeply that we seem to have failed to make clear to the Court that it was that "privilege and immunity" that we were contending for, and that the thought never entered our minds that the "privilege" of attending the university as a student comes from Federal sources. Of course that "privilege" is given by the state, but the "immunity" for which we have been contending is safeguarded by the privileges and immunities clause of the 14th amendment. On page 10 the Court says:

> "But that 'immunity' cannot be regarded as not within, or as distinguishable from, the 'liberty' of which they claim to have been deprived by the enforcement of the regents' order. If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause. Therefore we need only decide whether by state action the 'liberty' of these students has been infringed."

Again we feel ourselves contrained to point out, most respectfully, that we seem to have failed to make clear our contentions. To us it seems utterly clear that the "immunity" for which we are contending is not within, and is sharply distinguishable from, the liberty of conscience and of religion, of which appellants claim to have been deprived by the enforcement of the regents' order. The two propositions of law are completely separate and distinct. The "liberty" we invoke is the religious freedom guaranteed by the 1st amendment against invasion by Congress and guaranteed, as we believe, necessarily, by

the 14th amendment against invasion by the states. There is no connection whatever between that religious freedom and the "privilege and immunity" of freedom from enforced service in a branch of the Federal military establishment in time of peace. And so we must respectfully urge that even though the regents' order is not repugnant to the due process clause, and even though it does not deprive appellants of their liberty without due process of law by invading their freedom of religion, it *does* violate the privileges and immunities clause in the manner in which we have so often herein, in our brief and in our oral argument, pointed out. Also, we must respectfully urge that the function of this most Honorable Court is not only to decide whether by state action the "liberty" of the students has been infringed. We urge that it is the opportunity and the duty of the Court to decide whether by state action the privileges and immunities of these appellants have been abridged.

Further down on page 10 the Court says:

> "California has not drafted or called them to attend the university. They are seeking education offered by the state and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance."

Again with apologies for the necessity imposed upon us of differing from the Court, we point out that in our petition for mandate in the State Court we alleged that our students had petitioned for exemption from compulsory military drill upon the sole ground of their conscientious and religious objections. And that was true. That was the only ground upon which these young men were willing to stand in their dealings with their university. But we contended strenuously in the Court below and in this Court that our students not only were warranted in taking their stand by their religious and conscientious scruples but that they were protected in their stand thus taken by the privileges and immunities clause of the 14th amendment.

The zeal of the regents of the University of California for compulsory military training is understandable. Their position is the position taken uniformly by regents of land grant colleges throughout the country. Wisconsin and Minnesota have recently removed the compulsion and permitted students to take or leave the course in military science and tactics and the drill in the R. O. T. C. With the exception of Minnesota and Wisconsin Universities, all the land grant colleges still enforce compulsory military training. For providing the training (not for enforcing it) they receive Federal aid through the Department of the Interior. If their stipend from the United States is proportioned to the number of men in training, we need look no farther for a cogent reason for their insisting that all who may be forced to take the courses shall do so.

The Court Is Not Concerned With Legislative Policy.

In the brief filed *amicus curiae* by Professor Johnson of the University of Illinois in opposition to appellants, the statement is made that removal of the compulsion to drill would cut down military training by 60 per cent. If so, the insistence by the board of regents upon the compulsory feature becomes the more readily understandable. But, as is pointed out by Mr. Justice Cardozo in his concurring opinion herein,

> "In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law."

Congress, and Congress alone, can lawfully require compulsory service in a branch of the Federal military establishment. If the Court shall sustain our contentions under the head "privileges and immunities," Congress can prevent immediately the decimation of the student soldier ranks by passing a law requiring, or even authorizing compulsory training in the R. O. T. C. This *is* a matter of "legislative policy," and Congress makes the policy. The Court is not concerned with the wisdom of the policy. University regents have concerned themselves with it, but it is our contention that in doing so they have invaded the exclusive field of Congress, as spokesman for the people of the nation. In this connection we point out also that the legislative policy here involved is not "unrelated to privileges or liberties secured by the organic

law." We have shown that the "privileges" and immunities upon which appellants rely *are* secured by the organic law.

On page 7 of the opinion the Court says:

> "The allegations of the petition" (for mandate in the Supreme Court of California) "do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university."

That is true. But the allegations of the petition do mean the regents may not impose as a price for the education to which appellants are entitled as residents of California, the surrender of their immunity, under the Constitution and laws of the United States, from enforced service in any branch of the Federal military establishment in time of peace. The regents undoubtedly may determine what military training may be required. But that right may not be exercised arbitrarily or unreasonably. And we submit that it is arbitrary and unreasonable to compel appellants to surrender their privilege and immunity under Federal statutes and the Constitution from enforced peace-time service in the *Federal* military establishment.

R. O. T. C. Is Unquestionably a Part of the National Forces, Which Are Controlled Exclusively by Congress.

The opinion holds that appellants are not required "in any sense to become a part of the military establishment of the United States." We insist that they are subjected to exactly that requirement. But suppose we take another viewpoint. Section I of Title 10 U. S. C. A. is as follows:

> "Section 1. *National forces; persons liable to perform military duty.* All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

Certainly we can agree that only Congress can compel an alteration of the status of appellants as members of the "national forces." They were such members *before* they entered the university. As such they were subject to call, not of the state, but of the national government. The national government did not say to them: "You must now take an affirmative step as a member of the national forces and submit to compulsory training for war." No.

That command was given to them by the state of California, speaking through the university regents. Does the state have the authority, the power, to compel such submission? If training at the university were in a *state* military unit, an affirmative answer must be given. But isn't it clear that the state invades the Federal field when it commands young men to take military training in the Federal Government's Reserve Officers' Training Corps? The Federal government is making no such demand. Suppose more students submitted themselves for training than the United States Army officers in command could handle satisfactorily, and those officers called a halt on the incoming hordes seeking military training. Could the state, through the regents, force its students into the R. O. T. C. against the will of the War Department? Of course not! Why? Because the R. O. T. C. is established, supported and controlled by the Federal Government. It is a part of the government's machinery for building up its armies. It certainly is a part of *some* military establishment. Would any one—even a university regent—contend that it is a part of the state of California's military establishment? And would anyone, after reading the laws of the United States as hereinabove set forth, contend that the War Department does not govern it, and prescribe, authoritatively, the courses of instruction?

The Novel and Important Federal Question Remains Unanswered.

Our "privileges and immunities" argument, as presented in our brief and orally before the Court, may we respectfully point out, has not been met. We supported it with decisions of this Court, conclusively showing that a state may not impose as a price for a privilege which it may at its pleasure grant or withhold, the surrender of rights guaranteed by the Constitution and laws of the United States to citizens of the United States. When counsel had the privilege of presenting his petition for appeal to Mr. Justice Sutherland in chambers on April 6, 1934, that distinguished jurist allowed the appeal, and added a memorandum in which he stated that the case, on its merits, presented a "novel and important" Federal question. What was that question? To counsel who had propounded it, it was whether compulsory military training in the R. O. T. C., a branch of the Federal military establishment, abridges the privileges and immunities of appellants in violation of the 14th amendment. Stated differently, the question was whether or not the regents of the University of California may impose as a price for education, the surrender of rights belonging to appellants as citizens of the United States under the Constitution and laws of the United States. The "novel and important" question was not whether compulsory military service of any nature violated the due process clause by abridging freedom of religion. That question had been answered in the negative in the *Macintosh* case. Nor was the question whether conscientious objectors to compulsory military training in land grant colleges had the right to exemption upon the grounds of religion and conscience. That had

been answered in the negative by the Maryland Court of Appeals in *Coale v. Pearson,* and this Court had dismissed an appeal from that judgment for want of a substantial Federal question.

Most respectfully we urge that the millions of peace lovers in America who oppose compulsory military training in tax supported land grant colleges are entitled to an authoritative, understanding well considered answer by this Honorable Court to the question:

May a state university, which is a land grant college, impose as a price for the education to which they are in all other respects entitled by law, the surrender of students' immunity, by virtue of the laws and Constitution of the United States, from compulsory service, in time of peace, in any branch of the Federal military establishment?

We contend that it may not. And with the deepest faith we urge the Court to permit the cause to be reargued, to the end that justice may be achieved.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of California be, upon further consideration, reversed.

Respectfully submitted,

JOHN BEARDSLEY,
Counsel for Appellants.

Certificate of Counsel.

I, John Beardsley, counsel for the above named appellants, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

JOHN BEARDSLEY,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1934.

Albert W. Hamilton, a Minor, by Albert Hamilton, His Guardian ad Litem; W. Alonzo Reynolds, Jr., a Minor, by W. Alonzo Reynolds, His Guardian ad Litem, Albert Hamilton, and W. Alonzo Reynolds, Appellants, *vs.* The Regents of the University of California, Robert Gordon Sproul, and Ernest Carroll Moore.	Appeal from the Supreme Court of the State of California.

[December 3, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

This is an appeal under § 237(a), Judicial Code, 28 U. S. C., § 344(a), from a judgment of the highest court of California sustaining a state law that requires students at its university to take a course in military science and tactics the validity of which was by the appellants challenged as repugnant to the Constitution and laws of the United States.

The appellants are the above named minors and the fathers of each as his guardian *ad litem* and individually. They are taxpayers and citizens of the United States and of California. Appellees are the regents constituting a corporation created by the State to administer the university, its president and its provost. Appellants applied to the state supreme court for a writ of mandate compelling appellees to admit the minors into the university as students. So far as they are material to the questions presented here, the allegations of the petition are:

In October, 1933, each of these minors registered, became a student in the university and fully conformed to all its requirements other than that compelling him to take the course in military science and tactics in the Reserve Officers Training Corps which they assert to be an integral part of the military establishment of the United States and not connected in any way with the militia or

military establishment of the State. The primary object of there establishing units of the training corps is to qualify students for appointment in the Officers Reserve Corps. The courses in military training are those prescribed by the War Department. The regents require enrollment and participation of able-bodied male students who are citizens of the United States. These courses include instruction in rifle marksmanship, scouting and patrolling, drill and command, musketry, combat principles, and use of automatic rifles. Arms, equipment and uniforms for use of students in such courses are furnished by the War Department of the United States government.

These minors are members of the Methodist Episcopal Church and of the Epworth League and connected religious societies and organizations. For many years their fathers have been ordained ministers of that church. The Southern California Conference at its 1931 session adopted a resolution:

"With full appreciation of the heroic sacrifices of all those who have conscientiously and unselfishly served their country in times of war, but with the belief that the time has come in the unfolding light of the new day for the settlement of human conflicts by pacific means, and because we as Christians owe our first and supreme allegiance to Jesus Christ. Because the Methodist Episcopal Church in her General Conference of 1928 has declared: 'We renounce war as an instrument of national policy.' Because our nation led the nations of the world in signing the Paris Peace Pact, and the Constitution of the United States, Article 6, Section 2, provides that: 'This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made under authority of the United States shall be the Supreme Law of the Land'. Thus making the Paris Pact the supreme law of the land which declares: 'The high contracting parties agree that the settlement of all disputes or conflict—shall never be sought except by pacific means'.

"Therefore we, the Southern California Conference, memorialize the General Conference which convenes in Atlantic City in May, 1932; to petition the United States Government to grant exemption from military service to such citizens who are members of the Methodist Episcopal Church, as conscientiously believe that participation in war is a denial of their supreme allegiance to Jesus Christ."

And in 1932 the General Conference of that Church adopted as a part of its tenets and discipline:

"We hold that our country is benefited by having as citizens those who unswervingly follow the dictates of their consciences

. . . Furthermore, we believe it to be the duty of the churches to give moral support to those individuals who hold conscientious scruples against participation in military training or military service. We petition the government of the United States to grant to members of the Methodist Episcopal Church who may be conscientious objectors to war the same exemption from military service as has long been granted to members of the Society of Friends and other similar religious organizations. Similarly we petition all educational institutions which require military training to excuse from such training any student belonging to the Methodist Episcopal Church who has conscientious scruples against it. We earnestly petition the government of the United States to cease to support financially all military training in civil educational institutions".

And the Southern California Conference at its 1933 session adopted the following:

"Reserve Officers' Training Corps—Recalling the action of the General Conference asking for exemption from military service for those members of our church to whom war and preparation for war is a violation of conscience, we request the authorities of our State Universities at Berkeley, Los Angeles and Tucson, to exempt Methodist students from the R. O. T. C. on the grounds of conscientious objection, and we hereby pledge the moral and official backing of this Conference, seeking such exemption, provided that it be understood that no conscientious objector shall participate in the financial profits of war. The Secretary of the Conference is asked to send copies of this paragraph to the governing boards of these institutions."

Appellants as members of that church accept and feel themselves morally, religiously and conscientiously bound by its tenets and discipline as expressed in the quoted conference resolutions; each is a follower of the teachings of Jesus Christ; each accepts as a guide His teachings and those of the Bible and holds as a part of his religious and conscientious belief that war, training for war and military training are immoral, wrong and contrary to the letter and spirit of His teaching and the precepts of the Christian religion.

Therefore these students at the beginning of the fall term in 1933 petitioned the university for exemption from military training and participation in the activities of the training corps, upon the ground of their religious and conscientious objection to war and to military training. Their petition was denied. Thereupon, through that church's bishop in California, they and their fathers petitioned the regents that military training be made optional in

order that conscientious and religious objectors to war, training for war and military training might not be confronted with the necessity of violating and foreswearing their beliefs or being denied the right of education in the state university to which these minors are entitled under the constitution and laws of the State of California and of the United States.

The regents refused to make military training optional or to exempt these students. Then, because of their religious and conscientious objections, they declined to take the prescribed course and solely upon that ground the regents by formal notification suspended them from the university, but with leave to apply for readmission at any time conditioned upon their ability and willingness to comply with all applicable regulations of the university governing the matriculation and attendance of students. The university affords opportunity for education such as may not be had at any other institution in California except at a greater cost which these minors are not able to pay. And they, as appellees at the time of their suspension well knew, are willing to take as a substitute for military training such other courses as may be prescribed by the university.

Other allegations of the petition need not be stated as they merely go to show the grounds upon which appellants under the state practice sought the writ of mandate.

The university is a land grant college. An act of Congress (Morrill Act approved July 2, 1862, 12 Stat. 503; 7 U. S. C., § 301-308) donated public lands to the several States in order that upon the conditions specified all moneys derived from the sale of such lands or from the sale of land scrip issued under the act should be invested and constitute a perpetual fund the interest of which should be inviolably appropriated by each State accepting the benefits of the act "to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life".[1]

[1]The quoted language, § 4, has been twice reenacted. See Act of March 3, 1883, 22 Stat. 484. Act of April 13, 1926, 44 Stat. 247.

Morrill Act land grant colleges have been given federal aid under the

March 23, 1868, the legislature of California passed an act creating the university "in order to devote to the largest purposes of education the benefaction made to the State" by the Morrill Act. Stats. 1867-8, p. 248. This law of the state, called the organic act, provides that "any resident of California, of the age of fourteen years or upwards, of approved moral character, shall have the right to enter himself in the University as a student at large, and receive tuition in any branch or branches of instruction at the time when the same are given in their regular course, on such terms as the Board of Regents may prescribe". § 3. It declared that the college of agriculture should be first established, § 4; that the college of mechanic arts should be next established, § 5, "and in order to fulfil the requirements of the said Act of Congress, all able-bodied male students of the University, whether pursuing full or partial courses in any college, or as students at large, shall receive instruction and discipline in military tactics in such manner and to such extent as the Regents shall prescribe, the requisite arms for which shall be furnished by the State." § 6. Article IX, § 9, of the state constitution as amended November 5, 1918, declares: "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds . . . *provided,* that all moneys derived from the sale of public lands donated to this State by act of Congress approved July 2, 1862 (and the several acts amendatory thereof), shall be invested as provided by said acts of Congress and the income from said moneys shall be inviolably appropriated to the endowment, support and maintenance of at least one college of agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and mechanic arts, in accordance with the requirements and conditions of said acts of Congress". September 15, 1931, pursuant to the provisions of the or-

following Acts: March 2, 1887, 24 Stat. 440; August 30, 1890, 26 Stat. 417; March 16, 1906, 34 Stat. 63; March 4, 1907, 34 Stat. 1256, 1281; May 8, 1914, 38 Stat. 372; February 24, 1925, 43 Stat. 970; May 22, 1928, 45 Stat. 711. And see Acts of February 23, 1917, 39 Stat. 929; June 7, 1924, 43 Stat. 653; February 9, 1927, 44 Stat. 1065.

ganic act and constitution, the regents promulgated the following order:

"Every able bodied student of the University of California who, at the time of his matriculation at the University, is under the age of twenty-four years and a citizen of the United States and who has not attained full academic standing as a junior student in the University and has not completed the course in military science and tactics offered to freshmen and sophomore students at the University shall be and is hereby required as a condition to his attendance as a student to enroll in and complete a course of not less than one and one-half units of instruction in military science and tactics each semester of his attendance until such time as he shall have received a total of six units of such instruction or shall have attained full academic standing as a junior student."

In the court below appellants assailed the laws and order above referred to as repugnant to specified provisions of the California constitution, and political code. And they adequately challenged the validity of the state constitution, organic act and regents' order, in so far as they were by the regents construed to require these students to take the prescribed course in military science and tactics, as repugnant to the Constitution and laws of the United States.

The state court, without announcing an opinion, denied the petition for a writ of mandate. Appellants applied for a rehearing. The court, denying the application, handed down an opinion in which it held that Art. IX, § 9, reposes in the regents full powers of organization and government of the university subject to legislative control in respect of its endowments and funds; that by § 6 of the organic act and Art. IX, § 9, military tactics is expressly required to be included among the subjects which shall be taught at the university and that it is the duty of the regents to prescribe the nature and extent of the courses to be given and to determine what students shall be required to pursue them, and that the suspension of the petitioning students because of their refusal to pursue the compulsory courses in military training involved no violation of their rights under the Constitution of the United States.

By their assignment of errors, appellants call upon this court to decide whether the challenged provisions of the state constitution, organic act and regents' order, in so far as they impose compulsory military training, are repugnant to the privileges and immunities clause of the Fourteenth Amendment, the due process clause of that amendment or the treaty that is generally called the Briand-Kellogg Peace Pact. 46 Stat. 2343.

Appellees contend that this court has no jurisdiction because, as they say, the regents' order is not a "statute of any state" within the meaning of § 237(a), Judicial Code. But by the California constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university which, as it has been held, is a constitutional department or function of the state government. *Williams* v. *Wheeler* (1914) 23 Cal. App. 619, 623. *Wallace* v. *Regents* (1925) 75 Cal. App. 274, 277. The assailed order prescribes a rule of conduct and applies to all students belonging to the defined class. And it was because of its violation that the regents by resolution suspended these students. The meaning of "statute of any state" is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power. *King Mfg. Co.* v. *Augusta,* 277 U. S. 100. *Sultan Ry. Co.* v. *Dept. of Labor,* 277 U. S. 135. It follows that the order making military instruction compulsory is a statute of the State within the meaning of § 237 a.

And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention cannot be sustained for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance.[2]

The allegations of the petition do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university. While, by acceptance of the benefits of the Morrill Act of 1862 and the creation of the university in order appropriately to comply with the terms of the grant, the State became bound to offer students in that university instruction in military tactics, it remains untrammeled by federal enactment and is entirely free to determine for itself the branches of military training to be pro-

[2]Micas *v.* Williams, 104 U. S. 556. Wabash R. R. Co. *v.* Flannigan, 192 U. S. 29, 38. Deming *v.* Carlisle Packing Co., 226 U. S. 102, 105, 107. Erie Railroad *v.* Solomon, 237 U. S. 427. Chi. & Rock Island R. R. *v.* Devine, 239 U. S. 52, 54. Sugarman *v.* United States, 249 U. S. 182. Quong Ham Wah Co. *v.* Industrial Comm., 255 U. S. 445, 448-449. Zucht *v.* King, 260 U. S. 174, 176. Roe *v.* Kansas, 278 U. S. 191. Seaboard Air Line Ry. *v.* Watson, 287 U. S. 86, 92.

vided, the content of the instruction to be given and the objectives to be attained. That State—as did each of the other States of the Union—for the proper discharge of its obligations as beneficiary of the grant made the course in military instruction compulsory upon students. Recently Wisconsin and Minnesota have made it elective.[3] The question whether the State has bound itself to require students to take the training is not here involved. The validity of the challenged order does not depend upon the terms of the land grant.

The petition is not to be understood as showing that students required by the regents' order to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States. Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary cooperation between federal and state authorities in respect of the military instruction given in the land grant colleges[4]. The War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State. The States are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war and against every attack of public enemies. *Gilbert* v. *Minnesota*, 254 U. S. 325, 328-9. *State* v. *Holm*, 139 Minn. 267, 273. Undoubtedly every State has authority

[3]Each State has a land grant college; Massachusetts has two. In 1923 Wisconsin made the course elective. Wis. Laws, 1923, c. 226. On the argument of this case appellants' counsel stated that Minnesota has recently made the course elective. Circular 126, Preliminary Report, Land-Grant Colleges and Universities, 1933, Department of Interior, Office of Education.

[4]§§ 40-47 of National Defense Act of June 3, 1916, 39 Stat. 166, 191-2, as amended by §§ 33 and 34 of Act of June 4, 1920, 41 Stat. 759, 776, 777, Act of June 5, 1920, 41 Stat. 948, 967, and Act of May 12, 1928, 45 Stat. 501. 10 U. S. C., §§ 381-390. Army Regulations No. 145-10, § II, pars. 10 and 11. Cf. Acts of July 28, 1866, 14 Stat. 332, 336, and of May 4, 1870, 16 Stat. 373; R. S. § 1225, as amended July 5, 1884, 23 Stat. 107, 108; September 26, 1888, 25 Stat. 491; January 13, 1891, 26 Stat. 716; November 3, 1893, 28 Stat. 7; February 26, 1901, 31 Stat. 810; April 21, 1904, 33 Stat. 225; June 3, 1916, 39 Stat. 166, 197; June 4, 1920, 41 Stat. 759, 780.

to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion, Constitution, Art. I, § 8, cls. 12, 15 and 16. *Selective Draft Law Cases,* 245 U. S. 366, 380-383. *State* v. *Industrial Comm.,* 1925, 186 Wis. 1) or as members of local constabulary forces or as officers needed effectively to police the State. And, when made possible by the national government, the State in order more effectively to teach and train its citizens for these and like purposes may avail itself of the services of officers and equipment belonging to the military establishment of the United States. So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment. *Houston* v. *Moore,* 5 Wheat 1, 16-17. *Dunne* v. *The People,* (1879) 94 Ill. 120, 129. 1 Kent's Commentaries 265, 389. Cf. *Presser* v. *Illinois,* 116 U. S. 252.

The clauses of the Fourteenth Amendment invoked by appellants declare: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law." Appellants' contentions are that the enforcement of the order prescribing instruction in military science and tactics abridges some privilege or immunity covered by the first clause and deprives of liberty safeguarded by the second. The "privileges and immunities" protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. *Slaughter-House Cases,* 16 Wall. 36, 72-74, 77-80. *McPherson* v. *Blacker,* 146 U. S. 1, 38. *Duncan* v. *Missouri,* 152 U. S. 377, 382. *Twining* v. *New Jersey,* 211 U. S. 78, 97. *Maxwell* v. *Bugbee,* 250 U. S. 525, 538. *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 539. Appellants assert—unquestionably in good faith—that all war, preparation for war and the training required by the university are repugnant to the tenets and discipline of their church, to their religion and to their consciences.

The "privilege" of attending the university as a student comes not from federal sources but is given by the State. It is not within the asserted protection. The only "immunity" claimed by these students is freedom from obligation to comply with the rule prescribing military training. But that "immunity" cannot be regarded as not within, or as distinguishable from, the "liberty" of which they claim to have been deprived by the enforcement of the regents' order. If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause. Therefore we need only decide whether by state action the "liberty" of these students has been infringed.

There need be no attempt to enumerate or comprehensively to define what is included in the "liberty" protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. *Meyer* v. *Nebraska,* 262 U. S. 390, 399. *Pierce* v. *Society of Sisters,* 268 U. S. 510. *Stromberg* v. *California,* 283 U. S. 359, 368-369. *Near* v. *Minnesota,* 283 U. S. 697, 707. The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of "liberty" confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance.

Viewed in the light of our decisions that proposition must at once be put aside as untenable.

Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies. *Selective Draft Law Cases, supra,* p. 378. *Minor* v. *Happersett,* 21 Wall. 162, 166.

United States v. *Schwimmer*, 279 U. S. 644, involved a petition for naturalization by one opposed to bearing arms in defense of country. Holding the applicant not entitled to citizenship we said (p. 650): "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. . . .Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government."

In *United States* v. *MacIntosh*, 283 U. S. 605, a later naturalization case, the applicant was unwilling, because of conscientious objections, to take unqualifiedly the statutory oath of allegiance which contains this statement: "That he will support and defend the Constitution and laws of the United States against all enemies, foreign or domestic, and bear true faith and allegiance to the same." 8 U. S. C., § 381. His petition stated that he was willing if necessary to take up arms in defense of this country, "but I should want to be free to judge of the necessity". In amplification he said: "I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the government of the day." The opinion of this court quotes from petitioner's brief a statement to the effect that it is a "fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so". And, referring to that part of the argument in behalf of the applicant this court said (p. 623): "This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . . The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No

other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, this Court [upholding a state compulsory vaccination law] speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said: '. . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.' "

And see *Pearson* v. *Coale*, — Md. —, 167 Atl. 54, a case, similar to that now before us, decided against the contention of a student in the University of Maryland who on conscientious grounds objected to military training there required. His appeal to this Court was dismissed for the want of a substantial federal question. 290 U. S. 597.

Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, trangresses any constitutional right asserted by these appellants.

The contention that the regents' order is repugnant to the Briand-Kellogg Peace Pact requires little consideration. In that instrument the United States and the other high contracting parties declare that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another and agree that the settlement or solution of all disputes or conflicts which may arise among them shall never be sought except by pacific means. Clearly there is no conflict between the regents' order and the provisions of this treaty.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 55.—October Term, 1934.

Albert W. Hamilton, a Minor, by Albert Hamilton, His Guardian ad Litem; W. Alonzo Reynolds, Jr., a Minor, by W. Alonzo Reynolds, His Guardian ad Litem, Albert Hamilton, and W. Alonzo Reynolds, Appellants,
vs.
The Regents of the University of California, Robert Gordon Sproul, and Ernest Carroll Moore.

Appeal from the Supreme Court of the State of California.

[December 3, 1934.]

Mr. Justice Cardozo.

Concurring in the opinion I wish to say an extra word.

I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states.

Accepting that premise, I cannot find in the respondents' ordinance an obstruction by the state to "the free exercise" of religion as the phrase was understood by the founders of the nation, and by the generations that have followed. *Davis* v. *Beason*, 133 U. S. 333, 342.

There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace.* The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher

*As to the duty of the able-bodied citizen to aid in suppressing crime, see Matter of Babington *v.* Yellow Taxi Corp., 250 N. Y. 14, 16, and the authorities there assembled.

education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare. This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught. In controversies of this order courts do not concern themselves with matters of legislative policy, unrelated to privileges or liberties secured by the organic law. The First Amendment, if it be read into the Fourteenth, makes invalid any state law "respecting an establishment of religion or prohibiting the free exercise thereof." Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war.

The meaning of those liberties has striking illustration in statutes that were enacted in colonial times and later. They will be found collected in the opinion of the lower court in *United States* v. *MacIntosh*, 42 F. (2d) 845, 847, 848; 283 U. S. 605, 632, and more fully in the briefs of counsel. From the beginnings of our history Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one. This was done in Virginia in 1738 and 1782 (5 Hening 16; 11 *id.* 18; cf. 8 *id.* 242, 243; 10 *id.* 261, 262; 334, 335); in Massachusetts, (Acts and Resolves, 1758, vol. 4, p. 159; 1759, 4 *id.* 193; in North Carolina (1781, 24 State Records 156); and in New York Colonial Laws, 1755, vol. 3, pp. 1068, 1069). A like practice has been continued in the constitutions of many of the states. See, e. g., Constitution of Alabama, 1819, 1865, 1867 (F. N. Thorpe, Federal and State Constitutions, Colonial Charters and Other Organic Laws, vol. 1, pp. 105, 119, 147); Arkansas, 1868 (Thorpe, vol. 1, p. 325); Colorado, 1876 (Thorpe, vol. 1, p. 507); Idaho, 1889 (Thorpe, vol. 2, p. 943);

Illinois, 1819, 1870 (Thorpe, vol. 2, pp. 980, 1044); Indiana, 1816 (Thorpe, vol. 2, p. 1067); Iowa, 1846, 1857 (Thorpe, vol. 2, pp. 1132, 1148); Kansas, 1855, 1857, 1859 (Thorpe, vol. 2, pp. 1190, 1214, 1253); Kentucky, 1792, 1799, 1850, 1890 (Thorpe, vol. 3, pp. 1271, 1283, 1307, 1350); Louisiana, 1879, 1898 (Thorpe, vol. 3, pp. 1501, 1587); Michigan, 1850 (Thorpe, vol. 4, p. 1966); Mississippi, 1817 (Thorpe, vol. 4, p. 2041); Missouri, 1820, 1875 (Thorpe, vol. 4, pp. 2164, 2268; New Hampshire, 1794, 1902 (Thorpe, vol. 4, pp. 2472, 2495); New York, 1821, 1846 (Thorpe, vol. 5, pp. 2648, 2671); Pennsylvania, 1790, 1838 (Thorpe, vol. 5, pp. 3099, 3111); Vermont, 1793 (Thorpe, vol. 6, p. 3763). For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service. Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. On the contrary, the very lawmakers who were willing to give release from warlike acts had no thought that they were doing anything inconsistent with the moral claims of an objector, still less with his constitutional immunities, in coupling the exemption with these collateral conditions.

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

I am authorized to state that Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.